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A note by Joel Denton, a University law student not a member of the Student Board of Editors, appears in this issue.

Notes by Robert Bond and John W. Langford, law students in the North Carolina College for Negroes, appear in this issue.

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NOTES AND COMMENTS

Estates—Forfeiture of Life Estate for Non-Payment of Taxes

Defendant owned a life estate in a tract of land and the plaintiff was the remainderman. A tax sale certificate for 1937 taxes was purchased by the county at the sheriff's sale in October, 1938. In October, 1940, the life tenant paid the taxes and penalties accrued thereon, but plaintiff remainderman had previously instituted suit under C. S. 7982 to declare the life estate forfeited. No suit to foreclose the tax sale certificate was ever instituted. The court, following a prior decision,[1]

[1] Sibley v. Townsend, 206 N. C. 648, 175 S. E. 107 (1934).

held that failure to redeem within one year after sale of the certificate worked a forfeiture and that the plaintiff remainderman was entitled to the property.[2]

It is generally held that only the life tenant is liable for the taxes accruing during his occupancy[3] and that such taxes may not be enforced against the remainderman's interest.[4] However in North Carolina the tax is, by statute, expressly made a lien on the entire fee.[5]

It is provided by C. S. 7982 that: "Every person shall be liable for taxes assessed or charged upon the property or estate, real or personal, of which he is tenant for life. If any tenant for life of real estate shall suffer the same to be sold for taxes by reason of his neglect or refusal to pay the taxes thereon, and shall fail to redeem the same within one year after such sale, he shall thereby forfeit his life estate to the remainderman or reversioner. The remainderman or reversioner may redeem such lands in the same manner that is provided for the redemption of other lands. Moreover, such remainderman or reversioner shall have the right to recover of such tenant for life all damages sustained by reason of such neglect or refusal on the part of such tenant for life. If any tenant for life of personal property suffer the same to be sold for taxes by reason of any default of his, he shall be liable in damages to the remainderman or reversioner."[6] Only Arkansas and Ohio have provisions similar to this North Carolina statute.[7] But the courts of these states[8] and at least one federal court[9] have tended to soften the effect of these laws. Thus, it has been held that if for any reason the sale was invalid, i.e., if formalities of procedure were not complied with in the tax sale, there would be no forfeiture.[10] Where the life tenant

[2] Cooper et al. v. Cooper, 220 N. C. 490, 17 S. E. (2d) 655 (1941), petition for rehearing dismissed, 221 N. C. 124, 19 S. E. (2d) 237 (1942).

[3] Skyles v. Kincaid, 124 Ore. 443, 264 Pac. 432 (1928); Smith v. Miller, 158 N. C. 98, 73 S. E. 118 (1911).

[4] Bolt v. Sullivan, 173 S. C. 24, 174 S. E. 491 (1934); Patterson v. Old Dominion Trust Co., 149 Va. 597, 140 S. E. 810 (1927); Myers v. Myers, 186 Mich. 215, 152 N. W. 934 (1915); Tichenor v. Mechanics & Metals Nat. Bank, 96 N. J. Eq. 560, 125 Atl. 323 (1924).

[5] N. C. CODE ANN. (Michie, 1939) §7971(134)(9).

[6] N. C. CODE ANN. (Michie, 1939) §7982.

[7] DIGEST OF STAT. OF ARK. (Pope, 1937) §13813; OHIO GEN. CODE (Page, 1940) §5688.

[8] Estabrook v. Royon, 52 Ohio St. 318, 39 N. E. 808 (1895); Magness v. Harris, 80 Ark. 583, 98 S. W. 362 (1906); Mercantile Trust Co. v. Adams, 95 Ark. 333, 129 S. W. 1101 (1910); Hill v. Schultz, 181 Ark. 719, 27 S. W. (2d) 512 (1930).

[9] Anderson v. Messenger, 158 Fed. 250 (C. C. A. 6th, 1907).

[10] Estabrook v. Royon, 52 Ohio St. 318, 39 N. E. 808 (1895); Magness v. Harris, 80 Ark. 583, 98 S. W. 362 (1906). It was urged, in the petition for rehearing in the instant case, that the certificate sale was invalid because the property was insufficiently described and that, therefore, there was no forfeiture. However, the court held: (1) this was a mere afterthought; (2) the life tenant listed the property and could not take advantage of any inadequacy in the listing; (3) the description was sufficient and the sale valid. Cooper et al. v. Cooper, 221 N. C. 124, 19 S. E. (2d) 237 (1942).

procured a third person to purchase for him at the tax sale it was held that there was no forfeiture.[11] Where a widow, occupying the land by virtue of dower rights, failed to pay taxes, and more than a year passed after sale but redemption was perfected before the question of forfeiture was raised, it was held that no forfeiture resulted.[12]

It may be contended that the statute should be strictly construed against the life tenant. However, in view of the right of redemption given to the remainderman and the fact that the statute is penal in nature, it would seem that the better view would be to construe strictly in his favor. Further, even if strict construction against the life tenant may have been proper when the statute was first enacted, subsequent tax collection legislation[13] has so changed the situation that it is difficult to see how the forfeiture statute can apply at all in connection with the collection laws in force since 1927.

It will be noted that C. S. 7982 provides for forfeiture of life estates upon failure to redeem within one year after sale of the real estate. This is entirely consistent with the collection law as it existed prior to 1927, for at that time the holder of the tax sale certificate was entitled to a deed in fee simple if the lands were not redeemed within one year after the certificate sale. Thus sale of the certificate could easily be construed as a sale of the land with a redemption period reserved. In fact, since there was only one sale—that of the certificate—for purposes of the forfeiture statute this seems the only reasonable construction. But in 1927 the provision entitling the certificate holder to a deed was expressly repealed.[14] It was provided by the same law that the holder of the tax certificate was to have the right of foreclosure by civil action, and that this should be his only remedy.[15] This enactment made the certificate sale amount only to a sale of a lien on the land and not a sale of the land itself.[16] The forfeiture statute specifically provides that forfeiture shall occur only after sale of the land and failure of the life tenant to redeem within one year. Under the 1927 law (as under the 1939 law) there was no sale of the land until there was foreclosure of the tax

[11] Mercantile Trust Co. v. Adams, 95 Ark. 333, 129 S. W. 1101 (1910).
[12] Hill v. Schultz, 181 Ark. 719, 27 S. W. (2d) 512 (1930).
[13] Pub. Laws of N. C., 1927, Ch. 221; 1931, Ch. 428; 1939, Ch. 310, §§1719-1724.
[14] Pub. Laws of N. C., 1927, Ch. 221.
[15] Under the 1939 law a private certificate holder is still confined to the remedy of foreclosure. A taxing unit holding a certificate may adopt either the procedure of foreclosure by civil action or a simpler, more informal, judgment-docketing procedure. N. C. CODE ANN. (Michie, 1939) §§7971(228) and 7971(229).
[16] The 1927 law, unlike the 1939 law, did not expressly characterize the certificate sale as only a sale of the tax lien, as distinguished from a sale of the land, but such was its clear effect. It referred to sale of the real estate, but also referred to the purchaser having a "right of lien." In fact, the opinion on the petition for rehearing in the instant case twice refers to the sale of the certificate, made under the 1927 law, as "the sale of the tax lien." Cooper et al. v. Cooper, 221 N. C. 124, 126, 127, 19 S. E. (2d) 237, 238 (1942).

certificate, and the sale then had was in fee simple without any redemption privilege. It would seem to follow, then, that the statute providing for forfeiture of life estates after sale of the real estate and elapse of a redemption period should have no application[17] under the 1927 law, which was in effect when the certificate sale involved in the principal case was held, or the 1939 law,[18] which was in effect at the time of the forfeiture. Under neither of those laws can there be a sale of the land followed by a redemption period.

One effect of the later legislation, at least until enactment of the 1939 law, was to make more lenient the law of taxation by enlarging the period of redemption for delinquent taxpayers, though, as pointed out above, this redemption period precedes, rather than follows, the sale of the land. It seems most inequitable as well as against the intention of the legislature to say, as the court in the instant decision seems to do, that this leniency and this enlarged redemption period should not be for the benefit of a life tenant.

And even if this analysis of the statute is not correct[19] there are equities on the side of the defendant and inequities on the side of the plaintiff which nevertheless should have entitled the defendant to prevail. The defendant has paid all taxes and all penalties due on the land, thus removing all chance of the plaintiff remainderman losing his remainder; yet he is in substance told "Though you have done everything necessary to protect your remainderman, nevertheless you must forfeit your estate to him." It is submitted that the court should have given weight to these equities. Here the plaintiff had the right to pay the taxes and proceed against the life tenant for the same, together with the additional right to redeem the land whenever the tax lien was sought to be foreclosed if the life tenant did not do so. Nevertheless the remainderman elected to proceed against the life tenant to declare a forfeiture of the life estate under a statute which was passed in 1879 under conditions differing greatly from those now obtaining.

[17] See Leatherman v. Maytham, 66 Ohio App. 344, 33 N. E. (2d) 1022 (1940).

[18] The 1939 law did not change the character of the certificate sale, though it is expressly characterized as a sale of the tax lien. And the forfeiture statute should not apply under the 1939 law as, under neither type of foreclosure procedure authorized by it (see note 15), can there be a sale of the land followed by a redemption period to meet the requirements of C. S. 7982. However, the instant case seems to indicate that it, nevertheless, will apply.

[19] It may be conceded that if the forfeiture statute is to be applied at all under the 1927 and 1939 laws, the court is correct in fixing the time of the forfeiture at the end of a year following the certificate sale, at least in the absence of subsequent payment by the life tenant. How poorly this will fit with the 1939 law is illustrated by the fact that it would be possible (though not customarily done) to complete foreclosure and sell the land in fee simple, barring all redemption rights, within less than a year after the certificate sale. N. C. CODE ANN. (Michie, 1939) §7971 (228). In fact, this could very possibly have been done prior to 1939 by proceeding under N. C. CODE ANN. (Michie, 1939) §7990.

It is submitted that he should not be permitted to invoke this harsh remedy wherever there is reasonable factual basis for denying it. Forfeitures are not favored in law and, ordinarily, courts eagerly seize any opportunity to defeat them.

The majority of the court, without opinion, followed *Sibley v. Townsend*[20] in deciding the case under discussion. But as the dissenting judge says, "A vital distinction may be made between *Sibley v. Townsend* . . . and the case at bar because of the different factual situation. In the case at bar the defendant, in apt time, that is to say, before any date at which the lands might be stripped from her as well as the plaintiffs, repaired her fault and paid the tax. In *Sibley v. Townsend* . . . the life tenant not only did not repair the fault, but was not even concerned in the case. It was between a creditor of the life tenant and the remainderman. Thus, it is seen that the question before the court in the instant case—i.e., whether payment of the taxes by the life tenant before foreclosure of the tax certificate but more than one year after the tax sale will amount to redemption sufficient to satisfy the statute—did not arise and could not have been considered by the court in that case."[21]

If the instant decision is justifiable on any ground it must be that the action to declare a forfeiture was instituted prior to the time that the taxes, interest and penalties were paid by the life tenant.

It is suggested that the Legislature should repeal C. S. 7982 or that, at least, the statute should be amended to bring it in harmony with the present collection laws.

ROBERT BOND.

Fair Labor Standards Act—Determination of Coverage by Character of Employee's Activity

In two recent cases[1] the defendants each owned a loft or factory building in which most of the space was rented to tenants who were engaged in interstate commerce. The landlords were not engaged in interstate commerce themselves or in the production of goods for such commerce. The landlords employed freight and passenger elevator operators, watchmen, firemen, porters, engineers, carpenters, carpenters' helpers, and others who were necessary to the proper maintenance of the buildings. In both cases it was held that the landlord-employers were

[20] 206 N. C. 648, 175 S. E. 107 (1934).

[21] See dissenting opinion in Cooper et al. v. Cooper, 220 N. C. 490, at page 494, 17 S. E. (2d) 655, at page 658 (1941).

[1] Fleming v. Arsenal Building Corp., 125 F. (2d) 278 (C. C. A. 2d, 1941); Fleming v. A. B. Kirschbaum Co., 124 F. (2d) 567 (C. C. A. 3rd, 1941). For a criticism of the District Court opinion in the Arsenal case, see note (1941) 41 COL. L. REV. 1260.

subject to the Federal Fair Labor Standards Act[2] and had to pay the building employees in accordance with its wage and hour provisions. In reaching its conclusion the courts found: 1. The Act applied to all employees engaged in interstate commerce or in the production of goods therefor regardless of whether the employer was so engaged. 2. The building maintenance employees were engaged in activity closely enough connected with interstate commerce to bring them under the Act, and 3. The landlord was not a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" so as to bring it under the exemption provided for such concerns.

Since the famous *Darby*[3] case the question of the constitutionality of the Fair Labor Standards Act, more commonly known as the Wages and Hours Act, has been set at rest. There is now no doubt that Congress may protect interstate commerce from the evils attendant upon substandard labor conditions by regulation of minimum wages and maximum hours.[4] Pursuant to this power the Fair Labor Standards Act provides: "Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates. . ." (Sec. 6(a)).[5] "No employer shall . . . employ any of his employees who is engaged in commerce or in the production of goods for commerce . . . for a workweek longer than forty hours . . . unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed" (Sec. 7(a)).[6]

1. Employee's work governs coverage of the Act:—

Under these sections it is clearly the activity of the employee which determines the applicability of the Act. Unless the employee is engaged in commerce or in the production of goods for commerce his employer need not pay him in accordance with the specifications. Thus

[2] 29 U. S. C. A. §201, *et seq.*

[3] United States v. Darby, 312 U. S. 100, 61 S. Ct. 451, 85 L. ed. 609, 132 A. L. R. 1430 (1941); Opp Cotton Mills Inc. v. Administrator of the Wage and Hour Division of the Department of Labor, 312 U. S. 126, 61 S. Ct. 524, 85 L. ed. 624 (1941).

[4] Black, *Wages and Hours Laws in the Courts* (1939) 5 U. OF PITT. L. REV. 223; Cooper, *"Extra Time for Overtime" Now Law* (1938) 37 MICH. L. REV. 28; Maier, *Federal Regulation of Manufacturing under the Interstate Commerce Power* (1940) 24 MARQ. L. REV. 175; Marshino and O'Malley, *Wage and Hour Legislation in the Courts* (1937) 5 GEO. WASH. L. REV. 865; Murphy, *The Fair Labor Standards Act of 1938* (1939) 27 GEO. L. J. 459; Shefelman, *Fair Labor Standards Act of 1938* (1939) 14 WASH. L. REV. 66; Symposium on *Wages and Hours* (Summer, 1939) 6 LAW & CONTEMP. PROB. 323-494; notes (1939) 39 COL. L. REV. 818, (1939) 8 GEO. WASH. L. REV. 68, (1939) 52 HARV. L. REV. 646, (1939) 33 ILL. L. REV. 447, (1941) 6 JOHN MARSHALL L. Q. 451, (1939) 16 N. Y. U. L. Q. REV. 454, (1938) 11 SO. CALIF. L. REV. 240, (1938) 87 U. OF PA. L. REV. 92, (1939) 25 VA. L. REV. 340.

[5] 29 U. S. C. A. §206.

[6] 29 U. S. C. A. §207.

it is well established that even though an employer may himself be engaged in commerce he may have individual employees who are not so engaged as to bring them under the Act.[7] The instant cases go farther and consider the activity of the employee to be controlling to the extent that the activity of the employer becomes immaterial. This conclusion, logical enough from the literal terms of the Act, is so far reaching and significant, and involves such an extension of federal power, that it has been avoided by most of the other courts which have passed on the point.

Three cases involved fact situations identical with those in the instant cases.[8] Two cases have differed only in that office, instead of factory or loft, buildings were involved.[9] Though an office building is not quite so intimately connected with commerce or production as a building actually used in the manufacturing process it is felt that this is a distinction without a difference in that an office is certainly an integral and essential part of any concern which is engaged in commerce. In all of these cases it was felt that since the landlord was not engaged in commerce the Act should not apply to him even though his employees might have been covered by the Act if they had been employed by the tenants themselves. In short these courts took the position that in order for the Act to apply it was necessary for both the employer and the employee to be engaged in interstate commerce or in the production of goods for commerce. Where the landlord itself was engaged in interstate commerce and occupied one third of its own building, but there was nothing to show that the other tenants were also engaged in commerce, the court felt that the contribution of the building service employees to interstate commerce was so slight that they should not be allowed the advantages of the Act. Though there is no express statement the language of this opinion implies that a different result might have been reached if it had been clear that the greater part of the building was occupied by tenants engaged in interstate commerce.[10]

[7] Swift & Company v. Wilkerson, 124 F. (2d) 176 (C. C. A. 5th, 1941); Super-Cold Southwest Co. v. McBride, 124 F. (2d) 90 (C. C. A. 5th, 1941); Fleming v. American Stores Co., 42 F. Supp. 511 (E. D. Pa. 1941); Fleming v. Goldblatt, 39 F. Supp. 701 (N. D. Ill. 1941); Baggett v. Henry Fischer Packing Co., 37 F. Supp. 670 (W. D. Ky. 1941); Carlton v. London Mines & Milling Co., 4 W. & H. Rep. 189 (Colo. Dist. Ct., Denver Co., 1941); see notes 24 and 25 *infra*.

[8] Merryfield v. F. M. Hoyt Shoe Corp., 41 F. Supp. 795 (D. N. H. 1941); Killingbeck v. Garment Center Capitol, Inc., 259 App. Div. 691, 20 N. Y. S. (2d) 521, *motion for leave to appeal denied*, 259 App. Div. 1076, 21 N. Y. S. (2d) 610, and 284 N. Y. 818, 29 N. E. (2d) 397 (1940); Cecil v. Gradison, 4 W. & H. Rep. 698 (Ohio Ct. App., 1st Dist., 1941).

[9] Johnson v. Filstow, 5 W. & H. Rep. 286 (U. S. D. C. S. D. Fla. 1942); Robinson v. Massachusetts Mutual Life Insurance Co., 158 S. W. (2d) 441 (Tenn. Supreme Ct., 1941).

[10] Brandell v. Continental Illinois Bank & Trust Co. of Chicago, 43 F. Supp. 781, 4 W. & H. Rep. 694, 5 C. C. H. Labor Cases ¶60,876 (N. D. Ill. 1941).

The landlord-tenant cases have all been contra to the instant decisions, but in somewhat analogous situations results vary. Maintenance and repair men hired by an employer who leased trucks to concerns a substantial number of which were engaged in interstate commerce were found to be covered by the Act.[11] Where the employees are hired by an independent contractor engaged by a firm in commerce the Act has usually been applied.[12] The court in such cases refuses to allow the Act to be circumvented by the use of an independent contractor, but where watchmen were furnished to interstate firms by an independent detective agency the Act was not extended to cover them, either because their employer was not engaged in commerce or because he was exempt as a "service establishment."[13] Where the employer was only engaged in intrastate commerce the Wage and Hour Administrator has been denied the power to investigate his records to see if any of his employees were engaged in activity within the scope of the Act.[14] Many cases contain statements implying that both the employer and the employee must be engaged in commerce for the Act to apply,[15] but the instant cases have been expressly approved by at least two recent decisions.[16] Obviously there is much confusion in the courts.

2. Coverage of maintenance and service employees:—

But even if it should be conceded that the employer's status is of no consequence and the employee's activity is the only factor which is

[11] Snyder v. Casale, 5 W. & H. Rep. 222 (U. S. D. C. S. D. N. Y. 1942).

[12] Hall v. Warren-Bradshaw Drilling Co., 40 F. Supp. 272, 4 W. & H. Rep. 409 (N. D. Tex. 1941), *aff'd* 124 F. (2d) 42 (C. C. A. 5th, 1941); Allen v. Moe, 39 F. Supp. 5, 4 W. & H. Rep. 423 (D. Idaho 1941); Boylan v. Liden Mfging. Co., 4 W. & H. Rep. 158 (Mich. Circuit Ct., 1941); Boyd v. Dowell, Inc., 5 C. C. H. Labor Cases ¶60,770 (N. M. Dist. Ct., Lea Co., 1941); Atkocus v. Terker, 4 W. & H. Rep. 582 (N. Y. City Mun. Ct., 1941). Compare Fleming v. Hamlet Ice Co., 4 W. & H. Rep. 518 (U. S. D. C. E. D. N. C. 1941), Nelson v. Southern Ice Co., 4 W. & H. Rep. 562 (U. S. D. C. N. D. Tex. 1941), and Fleming v. Atlantic Co., 40 F. Supp. 654 (N. D. Ga. 1941) with Chapman v. Home Ice Co., 43 F. Supp. 424, 5 W. & H. Rep. 133 (W. D. Tenn. 1942), and Gordon v. Paducah Ice Mfging. Co., 41 F. Supp. 980, 4 W. & H. Rep. 713 (W. D. Ky. 1941). *Cf.* Corbett v. Schlumberger Well Surveying Corp., 43 F. Supp. 605 (S. D. Tex. 1942). *Contra,* Pederson v. J. F. Fitzgerald Const. Co., 262 N. Y. App. Div. 655, 30 N. Y. S. (2d) 989 (1941).

[13] Fleming v. Sondock, 43 F. Supp. 339 (S. D. Tex. 1942); Farr v. Smith Detective Agency & Night Watch Service, 38 F. Supp. 105 (N. D. Tex. 1941); *cf.* Bowman v. Pace Co., 119 F. (2d) 858 (C. C. A. 5th, 1941); David v. Boylan's Private Police, Inc., 34 F. Supp. 555 (E. D. La. 1940).

[14] General Tobacco & Grocery Co. v. Fleming, 125 F. (2d) 596, 5 W. & H. Rep. 103 (C. C. A. 6th, 1942).

[15] Woolfolk v. Orino, 5 W. & H. Rep. 132 (U. S. D. C. D. Ore. 1942); Fleming v. Goldblatt, 39 F. Supp. 701 (N. D. Ill. 1941); Muldowney v. Seaberg Elevator Co., Inc., 39 F. Supp. 275 (E. D. N. Y. 1941); Gerdert v. Certified Poultry & Egg Co., 38 F. Supp. 964 (S. D. Fla. 1941); Brown v. Carter Drilling Co., 38 F. Supp. 489 (S. D. Tex. 1941); Farr v. Smith Detective Agency & Night Watch Service, 38 F. Supp. 105 (N. D. Tex. 1941); Pederson v. J. F. Fitzgerald Const. Co., 262 N. Y. App. Div. 655, 30 N. Y. S. (2d) 989 (1941).

[16] Fleming v. American Stores Co., 42 F. Supp. 511 (E. D. Pa. 1941); Stiles v. Emmons, 5 W. & H. Rep. 189 (Ohio Ct. Com. Pleas, Hamilton Co., 1942).

important in applying the Act, there still remains the problem of whether the employees in the instant cases were "engaged in commerce or in the production of goods for commerce." On the applicability of the Act to maintenance and service employees the cases are in sharp, almost violent, conflict. Section 3(j) of the Act specifies that "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."[17] It has been pointed out that the Fair Labor Standards Act, unlike some of the other statutes, does not apply to activity which merely "affects" interstate commerce, but it is limited to employees who are "engaged" in commerce.[18] In construing this section many courts feel that the Act should be limited to those employees who have some actual physical connection with the production of the goods, and have refused to extend the Act's advantages to any others. But other tribunals have brought many more workers under a broader coverage of the Act by taking a liberal view of the provision as to occupations "necessary to the production" of the goods. One case says the Act should cover any employee who in any manner whatsoever contributes to the finished product.[19]

Watchmen have been a prolific source of litigation in this respect.[20]

[17] 29 U. S. C. A. §203(j).

[18] Jewel Tea Co. v. Williams, 118 F. (2d) 202 (C. C. A. 10th, 1941); Chapman v. Home Ice Co., 43 F. Supp. 424, 5 W. & H. Rep. 133 (W. D. Tenn. 1942); Overstreet v. North Shore Corp., 43 F. Supp. 445, 4 W. & H. Rep. 628 (S. D. Fla. 1941); Gerdert v. Certified Poultry & Egg Co., 38 F. Supp. 964 (S. D. Fla. 1941); note (1942) 36 ILL. L. REV. 569.

[19] Atkocus v. Terker, 4 W. & H. Rep. 582 (N. Y. City Mun. Ct., 1941).

[20] The following cases, and the instant cases, have applied the Act to watchmen: Midcontinent Pipe Line Co. v. Hargrave, 5 W. & H. Rep. 275 (U. S. C. C. A. 10th, 1942) *affirming* 42 F. Supp. 908 (E. D. Okla. 1941); Fleming v. American Stores Co., 42 F. Supp. 511 (E. D. Pa. 1941); Steger v. Beard & Stone Elec. Co., Inc., 4 W. & H. Rep. 411 (U. S. D. C. N. D. Tex. 1941); Williams v. General Mills, Inc., 39 F. Supp. 849 (N. D. Ohio 1941); Fleming v. Pearson Hardwood Flooring Co., 39 F. Supp. 300 (E. D. Tenn. 1941); Muldowney v. Seaberg Elevator Co., Inc., 39 F. Supp. 275 (E. D. N. Y. 1941); Lefevers v. General Export Iron & Metal Co., 36 F. Supp. 838 (S. D. Tex. 1940); Reeves v. Howard County Refining Co., 33 F. Supp. 90 (N. D. Tex. 1940); Wood v. Central Sand & Gravel Co., 33 F. Supp. 40 (W. D. Tenn. 1940); Crompton v. Baker, 220 N. C. 52, 16 S. E. (2d) 471 (1941); McMillan v. Wilson & Co., Inc., 4 W. & H. Rep. 409 (Minn. Dist. Ct., Ramsey Co., 1941); Hanson v. Queensboro Farm Products, 5 W. & H. Rep. 255 (N. Y. Supreme Ct., Queens Co., 1942); Doyle v. Johnson Bros., Inc., 176 Misc. 656, 28 N. Y. S. (2d) 452 (1941); Atkocus v. Terker, 4 W. & H. Rep. 582 (N. Y. City Mun. Ct., 1941); Spinner v. Waterways Fuel & Dock Co., 5 W. & H. Rep. 137 (Ohio Ct. App., 1st Dist., 1942); S. H. Robinson & Co. v. Larue, 158 S. W. (2d) 432 (Tenn. Supreme Ct., 1941); Pruett v. Carruthers & Son Lumber Co., 5 W. & H. Rep. 192 (Tenn. Ct. App., 1942); Johnson v. Phillips-Butteroff Mfging. Co., 5 W. & H. Rep. 112 (Tenn. Ch. Ct., 1942); Milan v. Texas Spring & Wheel Co., 5 W. & H. Rep. 71 (Tex. Ct. Civ. App.,

It is true that a watchman does not actually work on the goods which are produced. He does nothing in furtherance of the physical process of manufacture, but he is certainly essential and necessary to the safe and successful operation of the enterprise. Many of the cases which refuse to place watchmen within the scope of the Act could have reached the same result on other grounds, and thus are not square holdings that the position of watchman should not be covered.[21] Likewise many of the cases which apply the Act could have, and some have expressly, been bottomed on the fact that the watchmen in those cases performed services for their employers other than the mere preservation of property.[22] But even exclusive of these cases there are definite holdings both that watchmen, as such, are[23] and are not[24] within the Act. The same problem

1941); *accord*, Fleming v. Swift & Co., 41 F. Supp. 825 (N. D. Ill. 1941); Flores v. Baetjer, 4 W. & H. Rep. 471 (U. S. D. C. D. Puerto Rico, 1941).

The following cases have refused to apply the Act to watchmen: Fleming v. Sondock, 43 F. Supp. 339 (S. D. Tex. 1942); Brown v. Carter Drilling Co., 38 F. Supp. 489 (S. D. Tex. 1941); Farr v. Smith Detective Agency & Night Watch Service, 38 F. Supp. 105 (N. D. Tex. 1941); Rogers v. Glazer, 32 F. Supp. 990 (W. D. Mo. 1940); Hart v. Gregory, 220 N. C. 180, 16 S. E. (2d) 837 (1941); Serio v. Dee Cigar & Candy Co., 4 W. & H. Rep. 630 (Ala. Circuit Ct., 1st Judicial Circuit, 1941); Brown v. Bailey, 177 Tenn. 185, 147 S. W. (2d) 105 (1941); *cf.* Bowman v. Pace Co., 119 F. (2d) 858 (C. C. A. 5th, 1941); Bath v. Specter, 5 W. & H. Rep. 357 (U. S. D. C. N. D. Tex. 1942); David v. Boylan's Private Police, Inc., 34 F. Supp. 555 (E. D. La. 1940); Carpenter v. Waxahachie Cotton Warehouse, 5 W. & H. Rep. 360 (Tex. Ct. Civ. App., 10th Judicial Dist., 1942).

[21] Fleming v. Sondock, 43 F. Supp. 339 (S. D. Tex. 1942); Brown v. Carter Drilling Co., 38 F. Supp. 489 (S. D. Tex. 1941); Farr v. Smith Detective Agency & Night Watch Service, 38 F. Supp. 105 (N. D. Tex. 1941); Rogers v. Glazer, 32 F. Supp. 990 (W. D. Mo. 1940); Brown v. Bailey, 177 Tenn. 185, 147 S. W. (2d) 105 (1941); Serio v. Dee Cigar & Candy Co., 4 W. & H. Rep. 630 (Ala. Circuit Ct., 10th Judicial Circuit, 1941); Carpenter v. Waxahachie Cotton Warehouse, 5 W. & H. Rep. 360 (Tex. Ct. Civ. App., 10th Judicial Dist., 1942).

[22] Steger v. Beard & Stone Elec. Co., Inc., 4 W. & H. Rep. 411 (U. S. D. C. N. D. Tex. 1941); Muldowney v. Seaberg Elevator Co., Inc., 39 F. Supp. 275 (E. D. N. Y. 1941); Reeves v. Howard County Refining Co., 33 F. Supp. 90 (N. D. Tex. 1940); Wood v. Central Sand & Gravel Co., 33 F. Supp. 40 (W. D. Tenn. 1940); Crompton v. Baker, 220 N. C. 52, 16 S. E. (2d) 471 (1941); Hanson v. Queensboro Farm Products, 5 W. & H. Rep. 255 (N. Y. Supreme Ct., Queens Co., 1942); Doyle v. Johnson Bros., Inc., 176 Misc. 656, 28 N. Y. S. (2d) 452 (1941); Spinner v. Waterways Fuel & Dock Co., 5 W. & H. Rep. 137 (Ohio Ct. App., 1st Dist., 1942); Milan v. Texas Spring & Wheel Co., 5 W. &. H. Rep. 71 (Tex. Ct. Civ. App. 1941).

[23] Midcontinent Pipe Line Co. v. Hargrave, 5 W. & H. Rep. 275 (U. S. C. C. A. 10th, 1942); Fleming v. American Stores Co., 42 F. Supp. 511 (E. D. Pa. 1941); Williams v. General Mills, Inc., 39 F. Supp. 849 (N. D. Ohio 1941); Fleming v. Pearson Hardwood Flooring Co., 39 F. Supp. 300 (E. D. Tenn. 1941); Lefevers v. General Export Iron & Metal Co., 36 F. Supp. 838 (S. D. Tex. 1940); McMillan v. Wilson & Co., Inc., 4 W. & H. Rep. 409 (Minn. Dist. Ct., Ramsey Co., 1941); Atkocus v. Terker, 4 W. & H. Rep. 582 (N. Y. City Mun. Ct., 1941); S. H. Robinson v. Larue, 158 S. W. (2d) 432 (Tenn. Supreme Ct., 1941); Pruett v. Carruthers & Son Lumber Co., 5 W. & H. Rep. 192 (Tenn. Ct. App., 1942); Johnson v. Phillips-Butteroff Mfging. Co., 5 W. & H. Rep. 112 (Tenn. Ch. Ct., 1942).

[24] Hart v. Gregory, 220 N. C. 180, 16 S. E. (2d) 837 (1941).

arises as to other maintenance and service employees who are not involved in the manufacturing process itself but are engaged in work which is useful or necessary to the conduct of the business, and there is a resultant similar lack of harmony in the judicial interpretations of the status of such employees.[25]

The freight elevator operators iiivolved in the instant cases would seem to have a stronger claim to the protection of the Act because, although they do not actually touch or handle the goods, they are engaged in the transportation of the goods in their first step on their interstate journey. In order for them to be shipped interstate it is absolutely necessary that they be conveyed to the ground by elevator, and it would be absurd to contend that this vertical transportation should be considered in a different light from horizontal. Also the freight elevator operators carry goods up to the manufacturer to be processed. Even if the Act did not specifically provide that an employee should be deemed to be engaged in production if he was employed in "transporting"[26] it would seem that the freight elevator operator is so closely

[25] The following typical cases have refused to apply the Act: Swift & Co. v. Wilkerson, 124 F. (2d) 176 (C. C. A. 5th, 1941) (cashier); Woolfolk v. Orino, 5 W. & H. Rep. 132 (U. S. D. C. D. Ore. 1942) (cook for highway construction crew); Sybert v. Bradley, 4 W. & H. Rep. 630 (U. S. D. C. S. D. Ill. 1941) (porter-janitor); Drake v. Hirsh, 40 F. Supp. 290, 4 W. & H. Rep. 446 (N. D. Ga. 1941) (bookkeeper); Labates v. Interstate Co., 4 W. & H. Rep. 91 (U. S. D. C. W. D. Tenn. 1941) (cooks in restaurant at R.R. station); Abadie v. Cudahy Packing Co. of La., 37 F. Supp. 164 (E. D. La. 1941) (ledger clerk); Carlton v. London Mines & Milling Co., 4 W. & H. Rep. 561 (Colo. Dist. Ct., Denver Co., 1941) (weighmaster). *Cf.* Ikola v. Snoqualmie Falls Lumber Co., 4 W. & H. Rep. 360 (Wash. Superior Ct., King Co., 1941), *same case on rehearing*, 4 W. & H. Rep. 470 (Wash. Superior Ct., King Co., 1941), *same case reversed on appeal*, 121 P. (2d) 369, 5 W. & H. Rep. 142 (Wash. Supreme Ct., 1942) (waiter in cookhouse of logging company).

These cases applied the Act: Bowie v. Gonzalez, 117 F. (2d) 11 (C. C. A. 1st, 1941) (repair and maintenance men); Snyder v. Casale, 5 W. & H. Rep. 222 (U. S. D. C. S. D. N. Y. 1942) (repair and maintenance men); Womack v. Consolidated Timber Co., 43 F. Supp. 625, 5 W. & H. Rep. 10 (D. Ore. 1941) (employees in cookhouse of timber company); Overstreet v. North Shore Corp., 43 F. Supp. 445, 4 W. & H. Rep. 628 (S. D. Fla. 1941) (maintenancemen); Fleming v. Knox, 42 F. Supp. 948 (S. D. Ga. 1941) (bookkeepers and checkers); Fleming v. American Stores Co., 42 F. Supp. 511 (E. D. Pa. 1941) (maintenancemen, janitors); Fleming v. Atlantic Co., 40 F. Supp. 654 (N. D. Ga. 1941) (clerks, repairmen); Nelson v. Southern Ice Co., 4 W. & H. Rep. 562 (U. S. D. C. N. D. Tex. 1941) (repairman); Williams v. General Mills, Inc., 39 F. Supp. 849 (N. D. Ohio 1941) (maintenanceman); Allen v. Moe, 39 F. Supp. 5, 4 W. & H. Rep. 423 (D. Idaho 1941) (repairmen); Wonham v. Pa. Greyhound Lines, 4 W. & H. Rep. 218 (U. S. D. C. E. D. Pa. 1941) (porters at bus station); *accord*, Williams v. Jacksonville Terminal Co., 86 L. ed. (Adv. Ops.) 598 (U. S. Sup. Ct., 1942) (red caps at R. R. terminal); Super-Cold Southwest Co. v. McBride, 124 F. (2d) 90 (C. C. A. 5th, 1941) (refrigerator service man); Monk v. Continental Baking Co., 5 W. & H. Rep. 205 (U. S. D. C. N. D. Tex. 1942) (bookkeepers); Fleming v. Swift & Co., 41 F. Supp. 825 (N. D. Ill. 1941) (clerks, standards checkers, timekeepers, police, firemen, comptometer operators, etc.); Reck v. Zarnocay, 4 W. & H. Rep. 305 (N. Y. Sup. Ct., N. Y. Co., 1941) (equipment manager for dance band).

Many of the cases on both sides are distinguishable.

[26] See note 17 *supra*.

connected with the physical work done on the goods, and the movement of them in commerce, that he should be considered within the Act. Certainly the freight elevator operators were as much engaged in commerce, or in an occupation necessary to production for commerce, as red caps and porters in railroad and bus terminals.[27]

3. "Service establishment" exemption as applied to landlords:—

But Section 13(a) of the Act says, "The provisions of Sections 6 and 7 shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."[28] It will be noted that the wage and hour sections do not apply to "any employee" of the exempt establishment. Thus, unlike Sections 6 and 7, the status of the employer, not the employee, governs the application of the exemption.[29] Therefore, if the landlords in the instant cases could establish that they were operating a retail or service establishment the greater part of whose business was intrastate they would not have to pay any of their employees the minimum wage or time and a half for overtime—and this regardless of how directly any of their employees contributed to interstate commerce or production. Since the landlords sold no goods they were certainly not conducting a "retail" enterprise.[30] But their employees did render definite services to the tenants. The activity of the employee should not determine the scope of the exemption, however, for it only functions where the employer is a retail or service *establishment.* "The rendering of some service is incidental to most businesses but they are not thereby necessarily stamped as service establishments."[31]

[27] Williams v. Jacksonville Terminal Co., 86 L. ed. (Adv. Ops.) 598 (U. S. Sup. Ct., 1942); Harrison v. Terminal R. R. Ass'n. of St. Louis, Mo., 26 F. (2d) 421 (C. C. A. 8th, 1942); Wonham v. Pa. Greyhound Lines, 4 W. & H. Rep. 218 (U. S. D. C. E. D. Pa. 1941); notes (1941) 29 CALIF. L. REV. 774, (1940) 40 COL. L. REV. 1262, (1941) 39 MICH. L. REV. 486, (1941) 27 VA. L. REV. 957, (1941) 26 WASH. U. L. Q. 279.

[28] 29 U. S. C. A. §213(a) (2).

[29] Wood v. Central Sand & Gravel Co., 33 F. Supp. 40 (W. D. Tenn. 1940); *cf.* Womack v. Consolidated Timber Co., 43 F. Supp. 625, 5 W. & H. Rep. 10 (D. Ore. 1941).

[30] For cases applying the "retail" exemption see: White Motor Co. v. Littleton, 124 F. (2d) 92 (C. C. A. 5th, 1941); Baker v. Chapman Dairy Co., 5 W. & H. Rep. 56 (U. S. D. C. W. D. Mo. 1942); Womack v. Consolidated Timber Co., 43 F. Supp. 625, 5 W. & H. Rep. 10 (D. Ore. 1941); Duncan v. Montgomery Ward & Co., 42 F. Supp. 879 (S. D. Tex. 1941); Prescription House, Inc. v. Anderson, 42 F. Supp. 874 (S. D. Tex. 1941); Sybert v. Bradley, 4 W. & H. Rep. 630 (U. S. D. C. S. D. Ill. 1941); Jehs v. Singer Sewing Machine Co., 4 W. & H. Rep. 607 (U. S. D. C. N. D. Okla. 1941); Klotz v. Ippolito, 40 F. Supp. 422 (S. D. Tex. 1941); Collins v. Kidd, 38 F. Supp. 634 (E. D. Tex. 1941); Rogers v. Glazer, 32 F. Supp. 990 (W. D. Mo. 1940); Whitson v. Wexler, 4 W. & H. Rep. 91 (Tenn. Ch. Ct. 1941).

[31] Fleming v. A. B. Kirschbaum Co., 124 F. (2d) 567, 572 (C. C. A. 3rd, 1941); *accord,* Super-Cold Southwest Co. v. McBride, 124 F. (2d) 90 (C. C. A. 5th, 1941); Fleming v. Kenton Loose Leaf Tobacco Warehouse Co., 41 F. Supp. 255, 4 W. & H. Rep. 582 (E. D. Ky. 1941); Muldowney v. Seaberg Elevator Co., Inc., 39 F. Supp. 275 (E. D. N. Y. 1941).

Any services extended by the landlords to the tenants would seem to be rendered only as an inducement to obtain and keep renters. The primary object and function of the employer-landlord was not to render services for pay but to lease building space to satisfied tenants. Therefore, it seems rather awkward to designate the landlord as a service *establishment*. For these reasons, feeling that the exemption should be limited to barber shops, beauty parlors, shoe shining parlors, clothes pressing clubs, laundries, automobile repair shops, and similar concerns, the court in the *Kirschbaum* case found that the landlord was not exempt as a "service establishment." The *Arsenal* opinion did not go quite so far. It doubted that the landlord was a service establishment, but pointed out that even if it were the greater part of its servicing was not in intrastate commerce because it was rendered to tenants who were in interstate commerce. The category of "service establishments" is a bit vague at best, and it is certainly at least doubtful that the employers in the instant cases fall within it.[32] Therefore, in view of the fact that the Fair Labor Standards Act is a remedial statute and exemptions thereto should be strictly construed,[33] it is felt that the instant decisions correctly determined this issue.

Summation:—

The purpose of the Fair Labor Standards Act is to eliminate substandard labor conditions in interstate commerce and protect it from interstate competition with goods which have been produced with a low labor cost.[34] Since an employer would rather hire more men than pay time and a half for overtime the provisions of Section 7 may have been inserted for the purpose of decreasing unemployment by discouraging long hours for labor.[35] The instant cases point out that tenants who pay smaller rents because the landlord pays his labor low wages can produce goods more cheaply than similar manufacturers who have to either hire their own building maintenance employees at the prescribed rates or rent from a landlord who pays his labor a decent wage. Com-

[32] For cases applying the "service" exemption see: Corbett v. Schlumberger Well Surveying Corp., 43 F. Supp. 605 (S. D. Tex. 1942); Fleming v. Sondock, 43 F. Supp. 339 (S. D. Tex. 1942); Fleming v. Peoples Packing Co., 42 F. Supp. 868 (W. D. Okla. 1942); Hayes v. General Tire Service, Inc., 4 W. & H. Rep. 459 (U. S. D. C. N. D. Tex. 1941); Labates v. Interstate Co., 4 W. & H. Rep. 91 (U. S. D. C. W. D. Tenn. 1941); Stucker v. Roselle, 37 F. Supp. 864 (W. D. Ky. 1941); Hunt v. National Linen Service Corp., 157 S. W. (2d) 608, 4 W. & H. Rep. 729 (Tenn. Supreme Ct., 1941); Ridley v. General Cab Co. of Nashville, 5 W. & H. Rep. 169 (Tenn. Ch. Ct., Davidson Co., 1942).

[33] Bowie v. Gonzalez, 117 F. (2d) 11 (C. C. A. 1st, 1941); Fleming v. Hawkeye Pearl Button Co., 113 F. (2d) 52 (C. C. A. 8th, 1940); Boyer v. Miller Hatcheries, Inc., 42 F. Supp. 135 (S. D. Iowa 1941).

[34] 29 U. S. C. A. §202(a).

[35] *See* Missell v. Overnight Motor Transp. Co., 126 F. (2d) 98, 102 (C. C. A. 4th, 1942); Williams v. General Mills, Inc., 39 F. Supp. 849, 851 (N. D. Ohio 1941).

petition by such cheap goods is contrary to the policy of the Act.[36] One of the evils attendant upon substandard labor conditions is the strike for higher wages, with its resulting loss of time and money to the manufacturer. It is necessary to the manufacturing process that the elevators be kept in operation, the building be kept warm and fit to work in, and be protected from the depredations of prowlers and thieves. Should the building employees strike, the production of the occupants would be seriously hampered, if not entirely destroyed. This is indicative of the vital character of these employees' work and is sufficient reason in itself for finding them to be engaged in an occupation necessary to production within the meaning of the Act. The best social policy is achieved by extending the beneficial coverage of the Act as far as possible, and it is felt that the spirit and purposes of the Act are well served by the instant cases.

Though it is felt that the instant cases have taken the proper attitude in allowing the coverage of the Act to depend on the work done by the employee, to the complete disregard of the employer's activity, this novel, and to some minds drastic, step may present many problems in the future. For example, suppose that only a small part of the landlord's space had been leased to tenants who were engaged in interstate commerce. It is settled that it is not necessary for all, or even the greater part, of a concern's business to be interstate to warrant Federal control of the whole enterprise. If a "substantial part" of the business is interstate, it is sufficient,[37] but if too small a portion of the output of the concern is interstate, the maxim *de minimus* may be invoked to deny Federal supervision.[38] Judicious application of the *de minimus* doctrine would avoid unconscionable results where only a small number of tenants, leasing little space, were engaged in enterprises an inconsequential part of which was interstate in character. Another problem is presented by Section 15(a) (1), which makes it unlawful to ship in interstate commerce "any goods in the production of which any em-

[36] 29 U. S. C. A. §202(a) (3).

[37] National Labor Relations Board v. Fainblatt, 306 U. S. 601, 59 S. Ct. 668, 83 L. ed. 1014 (1939); Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453, 58 S. Ct. 656, 82 L. ed. 954 (1938); Snyder v. Casale, 5 W. & H. Rep. 222 (U. S. D. C. S. D. N. Y. 1942); Nelson v. Southern Ice Co., 4 W. & H. Rep. 562 (U. S. D. C. N. D. Tex. 1941); Drake v. Hirsh, 40 F. Supp. 290, 4 W. & H. Rep. 446 (N. D. Ga. 1941); Wood v. Central Sand & Gravel Co., 33 F. Supp. 40 (W. D. Tenn. 1940); Johnson v. Phillips-Butteroff Mfging. Co., 5 W. & H. Rep. 112 (Tenn. Ch. Ct., 1942); *accord,* Fleming v. Knox, 42 F. Supp. 948 (S. D. Ga. 1941). Notes (1939) 37 MICH. L. REV. 1328, (1938) ST. JOHN'S L. REV. 175, (1938) 47 YALE L. J. 1221, (1939) 6 U. OF CHI. L. REV. 313

[38] Owens v. Gifford-Hill Pipe Co., 4 W. & H. Rep. 697 (U. S. D. C. N. D. Tex. 1941); Morrow v. Lee Baking Co., 4 W. & H. Rep. 458 (U. S. D. C. N. D. Ga. 1941); Goldberg v. Worman, 37 F. Supp. 778 (S. D. Fla. 1941); Whitson v. Wexler, 4 W. & H. Rep. 91 (Tenn. Ch. Ct., 1941); *accord,* Gerdert v. Certified Poultry & Egg Co., 38 F. Supp. 964 (S. D. Fla. 1941).

ployee was employed in violation of Section 6 or Section 7."[39] Under the instant cases the employees of the landlord were employed in the production of the tenants' goods in violation of Sections 6 and 7. Thus, under a literal interpretation of the statute, it would seem to be unlawful for the tenants to ship their manufactured products, although they were not responsible for the payment of the building employees and had nothing to do with the violation of the Act. But it has been held that the employees cannot recover unpaid wages from anyone except their employer regardless of their having rendered their services for another who was engaged in commerce.[40] Note too the difference in wording between Sections 6 and 7 and Section 15(a). The first two sections apply to employees who have been "engaged" in commerce, etc., whereas Section 15(a) speaks of employees who have been "employed" in violation of the Act. By holding that the penalties of Section 15(a) (1) should only apply to shippers who have themselves employed employees in violation of the Act the inequitable result of tying up the tenants' goods because of the landlord's derelictions could be avoided.

Certiorari has been granted in both the instant cases and an authoritative ruling on many of the conflicting points should soon be handed down by the United States Supreme Court.

JOHN T. KILPATRICK, JR.

Freedom of Speech in Labor Disputes—Secondary Boycott—Anti-Picketing Injunction Under State Anti-Trust Act

R., cafe owner, entered into a contract with *P.*, a contractor, for the construction of a building. The building was in no way connected with the business of the cafe, and was one and one-half miles distant therefrom. *P.*, having absolute discretion as to the employment of labor, employed non-union labor. All of the employees of *R's.* cafe were union members, and there was no dispute between their employer and them. Neither was there any dispute between *R.* and the Carpenters and Joiners Union. But because *P.* employed non-union labor the Carpenters Union caused *R's.* cafe to be picketed. The signs borne by the pickets read: "This Place Unfair to Carpenters and Joiners Union of America Local no. 213 and Painters Local no. 130, Affiliated With American Federation of Labor". These signs were later amended to read: "The Owner of This Cafe Has Awarded a Contract to Erect a Building to W. A. Plaster Who is Unfair to The Carpenters Union 213

[39] 29 U. S. C. A. §215(a) (1).

[40] Whatley v. Great Southern Trucking Co., 4 W. & H. Rep. 625 (U. S. C. C. A. 5th, 1941); Bowman v. Pace Co., 119 F. (2d) 858 (C. C. A. 5th, 1941); Maddox v. Jones, 42 F. Supp. 35 (N. D. Ala. 1941); David v. Boylan's Private Police, Inc., 34 F. Supp. 555 (E. D. La. 1940). *But cf.* Cotterell v. Wetterau Grocer Co., 4 W. & H. Rep. 482 (U. S. D. C. E. D. Mo. 1941).

and Painters Union 130 Affiliated With American Federation of Labor". Contemporaneous with the picketing the restaurant worker's union called *R's.* employees out on strike. Truck drivers, delivering supplies, and other union workers refused to cross the picket lines, and as a result *R's.* business was decreased by sixty percent. It was conceded that there was neither fraud nor violence in the picketing. *R.* brought action under the Texas anti-trust statute for an injunction against the picketing. The Texas court granted an injunction which restrained the Union from picketing the restaurant, but did not restrain them from picketing at the construction job or elsewhere. The action of the Texas court was sustained by the Supreme Court of the United States on the ground that the Texas statute, as applied here, constituted a valid regulation rather than an unconstitutional denial of the freedom of speech.[1]

In a line of cases, starting with *Senn v. Tile Layers Protective Union,*[2] the United States Supreme Court said that peaceful picketing was protected under the First and Fourteenth Amendments to the Federal Constitution. It was said in the *Senn* case: "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."[3]

This idea was followed and expanded in the cases of *Thornhill v. Alabama*[4] and *Carlson v. California,*[5] where it was held that picketing *per se* presented no such "clear and present" danger as to justify a statute prohibiting all picketing, peaceful or otherwise. These two decisions were hailed as extremely important advances for labor. It was said that they shifted the burden from the Unions, which formerly had to prove the legality of their actions, to the state, which must now prove that anti-picketing legislation does not infringe labor's constitutional rights.[6]

In the case of *A. F. of L. v. Swing*[7] the area of picketing to which the constitutional guaranty of freedom of speech was applicable was expanded still further by a decision that the constitutional provision was applicable even in the absence of an employer-employee relationship. This step forward in the interest of labor caused speculation as to the

[1] Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe, 10 U. S. LAW WEEK 4293 (1942).
[2] Senn v. Tile Layers Protective Union, 301 U. S. 468, 81 L. ed. 1229, 57 S. Ct. 857 (1937).
[3] Senn v. Tile Layers Protective Union, 301 U. S. 468, 478, 81 L. ed. 1229, 1236, 57 S. Ct. 857, 862 (1937).
[4] Thornhill v. Alabama, 310 U. S. 88, 84 L. ed. 1093, 60 S. Ct. 736 (1940).
[5] Carlson v. California, 310 U. S. 106, 84 L. ed. 1104, 60 S. Ct. 879 (1940).
[6] Note (1940) 9 GEO. WASH. L. REV. 185.
[7] A. F. of L. v. Swing, 312 U. S. 321, 85 L. ed. 855, 61 S. Ct. 568 (1941).

extent that the court would go in protecting picketing under the Constitution. It was said: "Picketing, having been withdrawn from the area of state control in primary boycotts, and the permissible area of industrial conflict having been broadened by the elimination of the necessity for an employer-employee relationship, a slight further widening of the circle of 'economic competition' would place the secondary boycott within the realm of Constitutional right. Whether the court will take this step remains an open question. . .".[8] The question is no longer open. The court in the instant case clearly ruled that the First Amendment does not apply to secondary boycotts.

The test best adapted to the determination of whether a particular activity is covered by the guaranty of freedom of speech is the "clear and present" danger test.[9] This was the test applied in the *Carlson* case where it was decided that peaceful picketing presented no such clear and present danger as to justify a suppression of picketing.

It has been ruled in at least one case that a secondary boycott presents a danger to society. In *Iron Moulders Union v. Allis Chalmers Co.*[10] the court said: "In contests between capital and labor the only means of injuring each other that are lawful are those that operate directly and immediately upon the control and supply of work to be done and of labor to do it, and thus directly affect the apportionment of the common fund, for only at this point exists the competition, the evils of which organized society will endure rather than suppress the freedom and the initiative of the individual. But attempts to injure each other by coercing members of society who are not directly concerned in the pending controversy to make raids in the rear cannot be tolerated by organized society for the direct and *primary attack is upon society itself.*"[11]

The majority of the courts which have enjoined peaceful picketing in such situations have taken a different approach to the problem. The emphasis has been put upon the unlawful aspect of the secondary boycott rather than upon any "clear and imminent danger" to the state. They have proceeded on the theory that it is unlawful in an effort to compel *A.* to yield a legitimate benefit to *B.*, for *B.* to demand that *C.* withdraw his patronage from *A.* under penalty of losing *B's.* services or patronage and the services or patronage of those whom *B.* could

[8] Note (1941) 41 COL. L. REV. 1444.

[9] Whitney v. California, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 632 (1927); Schenk v. U. S., 249 U. S. 47, 63 L. ed. 470, 39 S. Ct. 247 (1919); *cf.* Gitlow v. People of New York, 268 U. S. 652, 69 L. ed. 1138, 45 S. Ct. 625 (1925), where it was held that a legislative determination that certain words constitute a "clear and present danger" is conclusive on the courts.

[10] Iron Molders Union v. Allis Chalmers Co., 166 Fed. 45 (C. C. A. 7th, 1908).

[11] Iron Molders Union v. Allis Chalmers Co., 166 Fed. 45, 51 (C. C. A. 7th, 1908).

peacefully and truthfully persuade to cease dealings with *C*. In other words, the courts, in so holding, have decided that *C's.* right to pursue his relations with *A.* are superior to *B's.* right of free speech in this situation. Under this interdiction have fallen cases involving the picketing of a boarding house where non-union workmen resided,[12] the picketing of premises of one using signs painted by an employer with whom the pickets had a dispute,[13] the picketing of a customer of a window cleaner with whom the pickets had a dispute,[14] the picketing of customers of a burglar alarm system installed by one of the disputants in a labor controversy,[15] and the picketing of advertisers in a newspaper because of a dispute with the latter.[16]

This position has not gone unchallenged,[17] and some courts, feeling the inconsistency between a holding which elevates property rights above the rights to freedom of speech and freedom of the press and the numerous judicial statements and holdings as to the sanctity of these two latter rights, have relaxed the rule somewhat. Where such courts have found a "unity of interest"[18] to exist between the employer with whom the pickets had a labor dispute and the party picketed, a secondary boycott was held not to be illegal. This situation arises where there is a dispute between an employer making and/or handling a product and his employees or members of a union, and the employees or members of the union picket the customers of the employer. The theory employed in these holdings is that the picketers are only following the

[12] F. R. Patch Mfg. Co. v. Protection Lodge, 77 Vt. 294, 60 Atl. 74 (1905).

[13] People v. Bellows, 281 N. Y. 67, 22 N. E. (2d) 238 (1939); American Gas Station v. "Doe," 250 App. Div. 227, 293 N. Y. Supp. 1019 (2d Dep't, 1937).

[14] Allied W. & H. Cleaning Co. v. Palmerie, 229 App. Div. 854, 243 N. Y. Supp. 848 (1st Dep't, 1930).

[15] Katzman & Co. v. Kirkman, 18 N. Y. Supp. (2d) 903 (1940); *Contra:* People v. Muller, 286 N. Y. 281, 36 N. E. (2d) 206 (1941).

[16] B. Gertz, Inc. v. Randau, 162 Misc. 786, 295 N. Y. Supp. 871 (Sup. Ct. 1937).

[17] Quinn v. Leathem, 17 T. L. R. 749 (Eng. 1901) note (1920) 6 A. L. R. 936, usually cited for the proposition that secondary boycotts are illegal, inferentially held that a secondary boycott was not *per se* illegal. In that case *the issue of violence in the picketing was submitted to the jury,* which found that violence existed. *On this basis* damages were awarded to the one picketed. In Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324, 327 (1909) it was said: "They may go even further than this [striking and engaging in a primary boycott], and request of another that he withdraw his patronage from the employer, and may use the moral intimidation and coercion of threatening a like boycott against him if he refuses to do so." This statement was approved in Truax v. Bisbee, 19 Ariz. 379, 171 Pac. 121 (1918); *cf.* Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 96 Pac. 127 (1908). In the American Law Institute, RESTATEMENT OF THE LAW OF TORTS, §801, the rule is laid down that employees are not liable to their employer or a third person if, in order to induce the third person to refrain from patronizing the employer, they induce others, by fair persuasion and for a proper object, to refrain (a) from buying from the third person goods or services which have been furnished to him by the employer, or (b) from selling to the third person goods or services which will be furnished by him to the employer.

[18] Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. (2d) 910 (1937); N. Y. Lumber Trade Association v. Lacy, 269 N. Y. 595, 199 N. E. 688 (1935); Willson and Adams Co. v. Pearce, 264 N. Y. 521, 191 N. E. 545 (1934).

product to the point where the picketing will be most effective; thus, general picketing of the retailer is forbidden by these courts, and the picketing is confined to the product of the employer with whom the dispute exists.[19] A few courts, more bold than the rest, have even gone beyond the requirement of a "unity of interest". The New York court, in a recent decision,[20] held that the picketing of a user of a burglar alarm system because of a dispute between the picketers and the maker of the alarm was a valid exercise of free speech. The California court, in a case not involving secondary boycott, has held that it is legal for members of a union to picket a non-union employer who persisted in keeping his establishment open on Sunday in competition with union employers who closed on that day.[21]

The severity (at least from labor's point of view) of the instant decision was somewhat mitigated by the case of *Bakery Drivers Union v. Wohl*,[22] decided at the same term of court. There it was held to be an invasion of Constitutional rights for New York to restrain peaceful picketing of a bakery which sold to peddlers with whom the union had a dispute. However, in the *Wohl* case the wording of the banner and the facts were such that it could be considered one of the "unity of interest" cases. At any rate, the *Wohl* decision would seem to limit the effect of the instant case to the ruling that to picket a business generally where there is no unity of interest, as that phrase is generally used by the courts, is an illegal exercise of freedom of speech which may be restrained by the state under an anti-trust statute.

The holding in the Texas case follows the majority view, but seems to be indicative of an attitude toward labor, which, if persisted in, might lead to further restrictions not so desirable in ordinary times. It is to be hoped, for this reason, that the holding is the result of the effect upon the courts of the circumstances of our times, rather than the end of a pro-labor trend.

FRED R. EDNEY, JR.

Removal of Causes—Proceedings in Federal and State Courts Subsequent to State Court's Denial of Motion to Remove

In certain types of cases the federal and state courts have concurrent original jurisdiction—the suit may be brought in either court.[1] The

[19] Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. (2d) 910 (1937); Englemeyer v. Simon, 148 Mich. 621, 265 N. Y. Supp. 636 (S. Ct. 1933); Commercial H. & W. Cleaning Co. v. Awerkin, 138 Misc. 512, 240 N. Y. Supp. 797 (S. Ct. 1930); Spanier Window Cleaning Co. v. Awerkin, 225 App. Div. 735, 232 N. Y. Supp. 886 (1st Dep't, 1928).

[20] People v. Muller, 286 N. Y. 281, 36 N. E. (2d) 206 (1941).

[21] Ex Parte Lyons, 27 Cal. App. 293, 81 P. (2d) 190 (1938).

[22] 10 U. S. LAW WEEK 4287 (1942).

[1] See HUGHES, FEDERAL PRACTICE (1931) c. 5, *Jurisdiction of District Courts*

plaintiff may choose the tribunal in which he wishes to institute the action, but in order to allow the defendant some choice of the court in which he is to be tried federal statutes[2] since the inception of the national judicial system have provided for the transfer or "removal" of the cause from the state court to the federal court at the instance of the defendant.[3]

In removal of suits against revenue officers or aliens, or where removal is sought because of local prejudice, the defendant must petition the Federal District Court, but in all other cases the removal petition must first be addressed to the state court.[4] There the state court determines whether the face of the record justifies removal, but if the plaintiff wishes to defeat removal by controverting any of the facts alleged he must do so in the federal court on a motion to remand.[5]

If a petition for removal, properly filed and alleging the necessary jurisdictional facts, is presented to the state court the removal takes place *eo instante;* the state court loses, and the federal court acquires, jurisdiction automatically by operation of law.[6] The state court is then without power to do anything except enter a formal order of removal and send a transcript of the record to the federal court. Any other proceedings in the state court subsequent to the filing of the petition are

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Concurrent with State Courts, §291 *et seq.;* Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499.

[2] 28 U. S. C. A. §§71-83; HUGHES, FEDERAL PRACTICE (1931) §§2271-2275. No suit may be removed except as provided by statute, and there may be no removal from the federal to the state courts. This paper is not concerned with the actual merits of whether or not any suit should be removed.

[3] At one time the statute allowed either the plaintiff or the defendant to obtain removal. 18 STAT. 470, 471 (1875); Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354 (1880). Now only a defendant may remove a case under 28 U. S. C. A. §71. MOORE, FEDERAL PRACTICE (1938) 3491. In the rare cases involving state land grants, either party may still remove if he claims the land by grant from a state other than that in which the action is pending. 28 U. S. C. A. §73; Shepherd's Heirs v. Young, 17 Ky. 203 (1824).

[4] 28 U. S. C. A. §§72, 76, 77.

[5] Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 25 S. Ct. 251, 49 L. ed. 462 (1905); Burlington, C. R. & N. Ry. Co. v. Dunn, 122 U. S. 513, 7 S. Ct. 1262, 30 L. ed. 1159 (1887); Carson v. Hyatt, 118 U. S. 279, 6 S. Ct. 1050, 30 L. ed. 167 (1886); Stone v. South Carolina, 117 U. S. 430, 6 S. Ct. 799, 29 L. ed. 962 (1886); Tate v. Southern R. R. Co., 205 N. C. 51, 169 S. E. 816 (1933); Morganton v. Hutton, 187 N. C. 736, 122 S. E. 842 (1924); Rea v. Standard Mirror Co., 158 N. C. 24, 73 S. E. 116 (1911); Higson v. North River Ins. Co., 153 N. C. 35, 68 S. E. 920 (1910), same case in federal court, 184 Fed. 165 (C. C. E. D. N. C., 1911); Springs v. Southern R. R. Co., 130 N. C. 186, 41 S. E. 100 (1902); Lawson v. Richmond & Danville R. R. Co., 112 N. C. 390, 17 S. E. 169 (1893); *see* Pruitt v. Charlotte Power Co., 165 N. C. 416, 419, 420, 81 S. E. 624, 626 (1914).

[6] Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 25 S. Ct. 251, 49 L. ed. 462 (1905); Huntley v. Southeastern Express Co., 191 N. C. 696, 132 S. E. 786 (1926); Smith v. Quarries Co., 164 N. C. 338, 80 S. E. 388 (1913); Harrison v. Allen, 152 N. C. 720, 68 S. E. 207 (1910); Tucker v. Interstate Life Assoc., 112 N. C. 796, 17 S. E. 532 (1893); Winslow v. Collins, 110 N. C. 119, 14 S. E. 512 (1892); HUGHES, FEDERAL PRACTICE (1931) §§2551, 2553.

void if the petition is eventually found to have been a proper one.[7] The federal court takes the case as if it had been originally instituted therein and all pleadings and procedure taken in the state court prior to the filing of the removal petition are to be given their proper effect in the federal court.[8]

But no action of the state court can force the federal court to entertain a suit which it considers to be beyond the scope of its jurisdiction. Whenever its lack of jurisdiction becomes apparent the federal court may, on its own motion, remand the cause to the state court from whence it came.[9] The plaintiff has a right to move for remand and, since federal jurisdiction may not be created by consent, he may not waive the right to move for remand for lack of jurisdiction though he might waive (or be estopped to assert) his right to a remand order for defective procedure in removing the case.[10] An order denying a motion to remand is not a final judgment from which there may be an immediate appeal to a higher federal court, but it may be reviewed on appeal after the final judgment is rendered following the trial in the lower court.[11] On the other hand, pursuant to the general policy of curtailing federal litigation wherever possible, an order of remand entered by the Federal District Court is not reviewable at all.[12] The order of remand may not

[7] See note 6 *supra.* Home Life Ins. Co. v. Dunn, 19 Wall. 214, 22 L. ed. 68 (1873); Rea v. Standard Mirror Co., 158 N. C. 24, 73 S. E. 116 (1911); *see* Pruitt v. Charlotte Power Co., 165 N. C. 416, 420, 81 S. E. 624, 626 (1914); HUGHES, FEDERAL PRACTICE (1931) §2554. *But cf.* Smith v. Greenlee, 14 N. C. 387 (1832).

[8] 28 U. S. C. A. §§72, 78, 79, 81; HUGHES, FEDERAL PRACTICE (1931) §2642. Though ordinarily there may be no removal unless the Federal District Court would have had original jurisdiction of the cause, this prohibition does not apply where the suit could not have been originally instituted in the federal court because of mere procedural or venue restrictions. HUGHES, FEDERAL PRACTICE (1931) §§2298, 2299. Since the jurisdiction of the federal court must rest on that of the state court from which the removal is made, no suit may be removed unless it was properly within the state court's jurisdiction. HUGHES, FEDERAL PRACTICE (1931) §2301.

[9] 28 U. S. C. A. §§71, 80; Kloeb v. Armour & Co., 311 U. S. 199, 61 S. Ct. 213, 85 L. ed. 124 (1940) (state court's decision on removability not *res judicata* in federal court); Employers' Reinsurance Corp. v. Bryant, 299 U. S. 374, 57 S. Ct. 273, 81 L. ed. 124 (1937); General Inv. Co. v. Lake Shore & M. S. Ry. Co., 260 U. S. 261, 43 S. Ct. 106, 67 L. ed. 244 (1922) (state court's decision as to sufficiency of service not conclusive on federal court upon removal); HUGHES, FEDERAL PRACTICE (1931) §§2651-2689, 5903; Notes (1941) 25 MINN. L. REV. 531, (1937) 14 N. Y. U. L. Q. REV. 411, (1941) 27 VA. L. REV. 549, (1940) 50 YALE L. J. 158.

[10] HUGHES, FEDERAL PRACTICE (1931) §§2658, 2659.

[11] HUGHES, FEDERAL PRACTICE (1931) §§2685, 2686, 5903; Note (1937) 14 N. Y. U. L. Q. REV. 411.

[12] "Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed." 28 U. S. C. A. §71; MOORE, FEDERAL PRACTICE (1938) 3516-3520.

be reviewed directly by appeal to a higher federal court,[13] by appeal or certiorari through the highest state court to the United States Supreme Court,[14] by mandamus to compel the District judge to take jurisdiction,[15] or in any other manner either direct or indirect.[16] In short the District Court's order of remand is final and conclusive upon all courts.

If the federal court decides not to assume jurisdiction its decision is controlling, but a contrary conclusion would not be so influential. The state court is not bound to accept the decision of the lower federal court. If the face of the record, assuming the verity of all facts alleged, does not, in the opinion of the state court, justify removal the state court is free to deny removal and continue with a trial on the merits.[17] Indeed the North Carolina court has even defied an order of removal granted by the lower federal court on grounds of local prejudice where the petition was first presented to the federal court.[18] Where the federal court has erroneously taken cognizance of the cause the state court cannot be forced to relinquish its jurisdiction. But if the defendant is actually entitled to a removal no action of the state tribunal may destroy his federal right.[19] If he believes that the state determination that the

[13] Morey v. Lockhart, 123 U. S. 56, 8 S. Ct. 65, 31 L. ed. 68 (1887).

[14] Yankaus v. Feltenstein, 244 U. S. 127, 37 S. Ct. 567, 61 L. ed. 1036 (1917); Missouri Pacific Ry. Co. v. Fitzgerald, 160 U. S. 556, 16 S. Ct. 389, 40 L. ed. 536 (1896).

[15] Kloeb v. Armour & Co., 311 U. S. 195, 61 S. Ct. 213, 85 L. ed. 124 (1940); Employers' Reinsurance Corp. v. Bryant, 299 U. S. 374, 57 S. Ct. 273, 81 L. ed. 289 (1937); *In re* Pennsylvania Co., 137 U. S. 451, 11 S. Ct. 141, 34 L. ed. 738 (1890); Moulding-Brownell Corp. v. Sullivan, 92 F. (2d) 646 (C. C. A. 7th, 1937).

[16] HUGHES, FEDERAL PRACTICE (1931) §2684; for a comprehensive survey and many collected cases see Note (1938) 114 A. L. R. 1476. The United States Supreme Court may review an order of the Circuit Court of Appeals remanding the cause to the state court, notwithstanding that there can be no review of a remand order of the District Court. Gay v. Ruff, 292 U. S. 25, 54 S. Ct. 608, 78 L. ed. 1099, 92 A. L. R. 970 (1934). Before 1875 a remand order of the lower federal court could be reviewed by mandamus but not by appeal because it was not a final judgment. Between 1875 and 1877 the order could be reviewed by writ of error or appeal. *See* Morey v. Lockhart, 123 U. S. 56, 57, 8 S. Ct. 65, 31 L. ed. 68, 69 (1887).

[17] Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 25 S. Ct. 251, 49 L. ed. 462 (1905); Carson v. Hyatt, 118 U. S. 279, 6 S. Ct. 1050, 30 L. ed. 167 (1886); Stone v. South Carolina, 117 U. S. 430, 6 S. Ct. 799, 29 L. ed. 962 (1886); Phoenix Ins. Co. v. Pechner, 95 U. S. 183, 24 L. ed. 427 (1877); Morganton v. Hutton, 187 N. C. 736, 122 S. E. 842 (1924); Higson v. North River Ins. Co., 153 N. C. 35, 68 S. E. 920 (1910), same case in federal court, 184 Fed. 165 (C. C. E. D. N. C. 1911); Springs v. Southern R. R. Co., 130 N. C. 186, 41 S. E. 100 (1902); Lawson v. Richmond & Danville R. R. Co., 112 N. C. 390, 17 S. E. 169 (1893); Tucker v. Interstate Life Assoc., 112 N. C. 796, 17 S. E. 532 (1893); *see* Pruitt v. Charlotte Power Co., 165 N. C. 416, 420, 81 S. E. 624, 626 (1914).

[18] Lawson v. Richmond & Danville R. R. Co., 112 N. C. 391, 17 S. E. 169 (1893). *But see* Higson v. North River Ins. Co., 153 N. C. 35, 39, 68 S. E. 920, 922 (1910), same case in federal court, 184 Fed. 165 (C. C. E. D. N. C. 1911).

[19] North Carolina Public Service Co. v. Southern Power Co., 282 Fed. 837, 33 A. L. R. 626 (C. C. A. 4th, 1922), *cert. granted,* 260 U. S. 716, 43 S. Ct. 94, 67 L. ed. 478 (1922), *cert. dismissed as improperly granted,* 263 U. S. 508, 44 S. Ct.

case is not removable is erroneous, and he still wishes to insist on his right to a federal trial, three possible procedures are open to him.[20]

FIRST:—He may save an exception to the state court's ruling and continue to contest the case in that court. In such a case his remaining in state court is not a waiver of his right to remove; and if the decision is adverse the defendant may seek a reversal of the denial of removal in the state appellate court, and, in a proper case, he may have the denial of removal reviewed by the United States Supreme Court.[21] Should they find that removal was improperly denied the cause will be remanded back through the successive appellate courts to the state court which denied the petition to remove, with directions to that court to enter an order of removal.[22] The defendant will then get his trial in the federal court. Such a procedure amply safeguards the right of the defendant to have a federal trial eventually, but it may be years before he can get a reversal of the denial of removal by some appellate court. All the disadvantages of delay accrue. It is certainly detrimental to the public interest to encumber the courts with prolonged litigation; and by the time the federal trial is obtained the defendant's witnesses may have died or departed, or evidence may have been lost. Of course it is possible that in a particular case the delay may work to the defendant's advantage, but in any case he will be burdened with the expense of having two trials.

SECOND:—Should the defendant decide that he wants an immediate federal trial he may, after denial of his removal petition, abandon the case in state court and invoke federal jurisdiction by filing in the Federal District Court a certified copy of the record. If the federal court determines that the case really should be removed it may take cognizance of the suit and proceed to trial. Thus the defendant may remove the

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164, 68 L. ed. 413 (1924), see same case in state court, 181 N. C. 356, 107 S. E. 226 (1921); Chesapeake & O. Ry. Co. v. McCabe, 213 U. S. 207, 29 S. Ct. 430, 53 L. ed. 765 (1908); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 25 S. Ct. 251, 49 L. ed. 462 (1905); Home Life Ins. Co. v. Dunn, 19 Wall. 214, 22 L. ed. 68 (1873); *accord*, Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667 (1879). *But cf.* Iowa Central R. Co. v. Bacon, 236 U. S. 305, 35 S. Ct. 357, 59 L. ed. 591 (1914).

[20] For a good summary see Metropolitan Casualty Ins. Co. v. Stevens, 312 U. S. 563, 61 S. Ct. 715, 85 L. ed. 1044 (1941) and cases cited.

[21] Metropolitan Casualty Ins. Co. v. Stevens, 312 U. S. 563, 567, 61 S. Ct. 715, 717, 85 L. ed. 1044 (1941); Iowa Central R. Co. v. Bacon, 236 U. S. 305, 35 S. Ct. 357, 59 L. ed. 591 (1914); Stone v. South Carolina, 117 U. S. 430, 6 S. Ct. 799, 29 L. ed. 962 (1886); Baltimore & O. R. R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 243 (1881); Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354 (1880); Removal Cases, 100 U. S. 457, 25 L. ed. 593 (1879); Phoenix Ins. Co. v. Pechner, 95 U. S. 183, 24 L. ed. 427 (1877); Gordon v. Longest, 16 Pet. 97, 10 L. ed. 900 (1842); Huntley v. Southeastern Express Co., 191 N. C. 696, 132 S. E. 786 (1926); Harrison v. Allen, 152 N. C. 720, 68 S. E. 207 (1910); Winslow v. Collins, 110 N. C. 119, 14 S. E. 512 (1892).

[22] Baltimore & O. R. R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 243 (1881); Gordon v. Longest, 16 Pet. 97, 10 L. ed. 427 (1842).

case to the federal court despite the ruling of the state court,[23] and if the plaintiff does not come into federal court his suit may be dismissed there for want of prosecution.[24] But the District Court's assumption of jurisdiction is reviewable on appeal[25] and the case may be remanded at any time lack of jurisdiction appears.[26] The effect of remand is to declare that the federal court never had jurisdiction and that therefore the state court never lost jurisdiction. The case is treated as if it had never been removed.[27] Since theoretically the state court never relinquished jurisdiction it follows that any action the state court may have taken in the interim before the remand would be valid.[28] For this reason the defendant risks losing his entire case by attempting a removal and at the same time abandoning the suit in state court. Except in removals of suits against revenue officers or aliens, or for local prejudice or denial of civil rights the removal must take place, if at all, before the expiration of the time for filing the answer in the state court.[29] The proceedings

[23] Metropolitan Casualty Ins. Co. v. Stevens, 312 U. S. 563, 567, 61 S. Ct. 715, 717, 85 L. ed. 1044 (1941); Chesapeake & O. Ry. Co. v. McCabe, 213 U. S. 207, 29 S. Ct. 430, 53 L. ed. 765 (1908); Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354 (1880); Removal Cases, 100 U. S. 457, 25 L. ed. 593 (1879); Home Life Ins. Co. v. Dunn, 19 Wall. 214, 22 L. ed. 68 (1873); North Carolina Public Service Co. v. Southern Power Co., 282 Fed. 837, 33 A. L. R. 626 (C. C. A. 4th, 1922), *cert. granted,* 260 U. S. 716, 43 S. Ct. 94, 67 L. ed. 498 (1922), *cert. dismissed as improperly granted,* 263 U. S. 508, 44 S. Ct. 164, 68 L. ed. 413 (1924), same case in state court, 181 N. C. 356, 107 S. E. 226 (1921); *see* Pruitt v. Charlotte Power Co., 165 N. C. 416, 420, 81 S. E. 624, 626 (1914); see note 19 *supra.*

[24] Iowa Central Ry. Co. v. Bacon, 236 U. S. 305, 35 S. Ct. 357, 59 L. ed. 591 (1914).

[25] The only proper method of review in such cases is by appeal to a higher federal court. It is not proper for the plaintiff to continue in state court and ignore the proceedings in federal court on the theory that they will be a nullity if that court erroneously assumed jurisdiction. Such a collateral attack will not be entertained by the United States Supreme Court when the case comes there from the highest state court, and it will refuse to review the District Court's decision. Chesapeake & O. Ry. Co. v. McCabe, 213 U. S. 207, 29 S. Ct. 430, 53 L. ed. 765 (1908); Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354 (1880). And the United States Supreme Court would review and reverse any state decision permitting a collateral attack on the unreversed decision of the federal court that it had jurisdiction.

[26] See notes 9, 10, & 11 *supra.*

[27] Metropolitan Casualty Ins. Co. v. Stevens, 312 U. S. 563, 61 S. Ct. 715, 85 L. ed. 1044 (1941); Queens Ins. Co. v. Peters, 10 Ga. App. 289, 73 S. E. 536 (1912); Germania Fire Ins. Co. v. Francis, 52 Miss. 457, 24 Am. Rep. 674 (1876).

[28] Metropolitan Casualty Ins. Co. v. Stevens, 312 U. S. 563, 61 S. Ct. 715, 85 L. ed. 1044 (1941); Yankaus v. Feltenstein, 244 U. S. 127, 37 S. Ct. 567, 61 L. ed. 1036 (1917); Western Indemnity Co. v. Kendall, 27 Ariz. 342, 233 Pac. 583 (1925); Union Gas & Oil Co. v. Indian-Tex Petroleum Co., 203 Ky. 521, 263 S. W. 1 (1924); *accord,* Iowa Central Ry. Co. v. Bacon, 236 U. S. 305, 35 S. Ct. 357, 59 L. ed. 591 (1914). *Contra:* Texas & P. Ry. Co. v. Davis, 93 Tex. 378, 55 S. W. 562 (1900).

[29] 28 U. S. C. A. §§72, 74, 76, 77; Butler v. Armour & Co., 192 N. C. 510, 135 S. E. 350 (1926); Powell v. Assurance Society, 187 N. C. 596, 122 S. E. 303 (1924); Patterson v. Champion Lumber Co., 175 N. C. 90, 94 S. E. 692 (1918); Pruitt v. Charlotte Power Co., 165 N. C. 416, 81 S. E. 624 (1914); Higson v. North River Ins. Co., 153 N. C. 35, 68 S. E. 920 (1910), same case in federal court, 184 Fed. 165 (C. C. E. D. N. C. 1911); Bryson v. Southern R. R. Co., 141 N. C. 594, 54 S. E. 434 (1906); Lewis v. Clyde Steamship Co., 131 N. C. 652, 42 S. E. 969 (1902); Mecke v. Vallytown Mineral Co., 122 N. C. 790, 29 S. E. 781

in the federal court do not extend this period and if the defendant neglects to file his answer the state court may enter judgment for the plaintiff by default, or the plaintiff may easily win the case in the absence of the opposition of the defendant in the state court.[30] If the defendant has filed an answer in apt time in the federal court before remand the state court is under no obligation to consider it.[31] Indeed, since theoretically the federal court never had jurisdiction it never had the power to accept the answer. If the remand order has been entered by the Federal District Court it cannot be reviewed and if by that time the state court has rendered a default judgment for the plaintiff this judgment would be *res judicata.* Nor, since the defendant's mistake as to the proper jurisdiction was one of law and not of fact, will the

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(1898); Howard v. Southern R. R. Co., 122 N. C. 944, 29 S. E. 778 (1898); Williams v. Southern Bell Telephone Co., 116 N. C. 558, 21 S. E. 298 (1895). *But cf.* Hyder v. Southern R. R. Co., 167 N. C. 584, 83 S. E. 689 (1914); McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) 287; MOORE, FEDERAL PRACTICE (1938) 3521-3528

[30] In the following cases the defendant, believing the suit had been removed, failed to answer in the state court and so lost by default. Metropolitan Casualty Ins. Co. v. Stevens, 312 U. S. 563, 61 S. Ct. 715, 85 L. ed. 1044 (1941); Yankaus v. Feltenstein, 244 U. S. 127, 37 S. Ct. 567, 61 L. ed. 1036 (1917); Higson v. North River Ins. Co. 153 N. C. 35, 68 S. E. 920 (1910), same case in federal court, 184 Fed. 165 (C. C. E. D. N. C. 1911); Western Indemnity Co. v. Kendall, 27 Ariz. 342, 233 Pac. 583 (1925); Kingsbury v. Brown, 60 Idaho 464, 92 P. (2d) 1053, 124 A. L. R. 149 (1939); State v. American Surety Co., 26 Idaho 652, 145 Pac. 1097, Ann. Cas. 1916E, 209 (1914); Morbeck v. Bradford-Kennedy Co., 19 Idaho 83, 113 Pac. 89 (1910); Roberts v. Chicago St. P., M. & O. Ry. Co., 48 Minn. 521, 51 N. W. 478 (1892), *affirmed,* 164 U. S. 703, 17 S. Ct. 992, 41 L. ed. 1183 (1896); McCanna v. Mutual Investment & Agency Co., 37 N. M. 567, 26 P. (2d) 231 (1933); Citizens' Light, Power & Telephone Co. v. Usnik, 26 N. M. 494, 194 Pac. 862 (1921); Tierney v. Helvetia Swiss Fire Ins. Co., 126 App. Div. 446, 110 N. Y. Supp. 613 (1908). He may, through lapse of time, lose his right to appeal in the state courts. Finney v. American Bonding Co., 13 Idaho 534, 90 Pac. 859, 91 Pac. 318 (1907); Mills v. American Bonding Co., 13 Idaho 556, 91 Pac. 381 (1907). In Union Gas & Oil Co. v. Indian-Tex Petroleum Co., 203 Ky. 521, 263 S. W. 1 (1924) the plaintiff lost on a counterclaim through failure to file a reply in state court after he had attempted removal. In Pearson v. Zacher, 177 Minn. 182, 225 N. W. 9 (1929) judgment was entered against the defendant after refusal to testify against and failure to contest garnishment proceedings in state court after attempted removal. In Sinclair Oil & Gas Co. v. Albright, 161 Okla. 272, 18 P. (2d) 540 (1933) there was a loss through neglect of contest in state court by non-resident defendants under belief that the suit had been removed as to them. Where an insurance policy contained a clause making it incontestable after two years the defendant, under the belief that the policy was being contested in federal court after removal, lost the suit through failure to contest in the state court before the end of two years. Tracy Loan & Trust Co. v. Mutual Life Ins. Co., 79 Utah 33, 7 P. (2d) 279 (1932). *But cf.* Texas & P. Ry. Co. v. Davis, 93 Tex. 378, 55 S. W. 562 (1900) (judgment entered in state court in interim before remand from federal court held invalid even though defendant answered and defended the case); Bishop-Babcock Sales Co. v. Lackman, 4 S. W. (2d) 109 (Tex. Civ. App., 1928) (privilege of change of venue in state court not lost by delay, answering to merits, and filing cross-action in federal court).

[31] Yankaus v. Feltenstein, 244 U. S. 127, 37 S. Ct. 567, 61 L. ed. 1036 (1917); Ayres v. Wiswall, 112 U. S. 187, 5 S. Ct. 90, 28 L. ed. 693 (1884); Citizens' Light, Power & Telephone Co. v. Usnik, 26 N. M. 494, 194 Pac. 862 (1921); Tracy Loan & Trust Co. v. Mutual Life Ins. Co., 79 Utah 33, 7 P. (2d) 279 (1932).

default be set aside because of defendant's mistake, inadvertence, surprise, or excusable neglect.[32] Therefore the defendant would have lost the suit without regard to the merits of his defense and would be without redress in any court.

The defendant may sometimes guard against such a result by having the federal court enjoin the plaintiff from proceeding in the state court during the time the suit is in the federal court.[33] Though ordinarily a federal court may not enjoin proceedings in a state court, its power to do so in removal cases has been recognized as an exception to the anti-injunction statute even by recent cases narrowing such exceptions.[34] However, because of general federal policy against enjoining state court proceedings the injunction will not issue in doubtful cases.[35] And even if the injunction were obtained it might not completely protect the defendant. Such an injunction probably would not extend the time for filing an answer in state court, and therefore there seems to be no reason why the state court might not enter a default judgment immediately after remand for failure of the defendant to answer during the period which had expired while the case was pending in federal court.[36] This has even been done where the state court itself ordered the removal and stayed its own proceedings.[37]

[32] Kingsbury v. Brown, 60 Idaho 464, 92 P. (2d) 1053, 124 A. L. R. 149 (1939); State v. American Surety Co., 26 Idaho 652, 145 Pac. 1097, ANN. CAS. 1916E, 209 (1914); Morbeck v. Bradford-Kennedy Co., 19 Idaho 83, 113 Pac. 89 (1910). The Idaho cases are the only ones which have been discovered which explicitly discuss this particular point, but it is felt that other courts, with the possible exception of Texas, would follow this example. *Cf.* Texas & P. Ry. Co. v. Davis, 93 Tex. 378, 55 S. W. 562 (1900); Bishop-Babcock Sales Co. v. Lackman, 4 S. W. (2d) 109 (Tex. Civ. App., 1928).

[33] HUGHES, FEDERAL PRACTICE (1931) §§1099, 1100, 1102, 1255, 2562; MOORE, FEDERAL PRACTICE (1938) 3327, 3529, n. 40.

[34] "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." 28 U. S. C. A. §379; Toucey v. New York Life Ins. Co., 314 U. S. 118, 62 S. Ct. 139, 86 L. ed. (Adv. Ops.) 107 (1941); Chesapeake & O. Ry. Co. v. McCabe, 213 U. S. 207 29 S. Ct. 430, 53 L. ed. 765 (1908); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 25 S. Ct. 251, 49 L. ed. 462 (1905); Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. ed. 497 (1881); see Note (1923) 24 A. L. R. 1084, 1104 and cases cited.

[35] HUGHES, FEDERAL PRACTICE (1931) §2562.

[36] Yankaus v. Feltenstein, 244 U. S. 127, 37 S. Ct. 567, 61 L. ed. 1036 (1917) (injunction against enforcement of state court judgment rendered prior to the injunction but subsequent to attempted removal); Pearson v. Zacher, 177 Minn. 182, 225 N. W. 9 (1929) (state court proceedings restrained after an order for judgment was filed but before judgment was entered). In these cases the state court continued with its proceedings after remand just as if there had been no injunction. Though no case has been found precisely on the point, involving a federal injunction, it is felt, in view of the statements in the state cases, cited in note 37 *infra*, that the statement in the text is correct.

[37] Kingsbury v. Brown, 60 Idaho 464, 92 P. (2d) 1053, 124 A. L. R. 149 (1939); "The order of the [state] district judge staying further proceedings in the state court had no reference to the appearance of the defendants, nor could it extend their time for answering. This order stayed proceedings in the [state]

THIRD:—It would seem that in order to be safe and at the same time secure a prompt federal trial the defendant must follow his only other alternative course—he must proceed with equal alertness and vigor in both courts at the same time. He may continue to contest the action in the state court and at the same time contest the same case in the federal court to which he may have taken it despite the state court's ruling in denial of removal.[38] Both cases would be reviewable as to removability in the appellate courts and might be carried to the United States Supreme Court in proper cases.[39] All proceedings in the court finally determined not to have proper jurisdiction would be void, and an order to remand to the state court would negate any advantage the defendant may have gained by the federal court proceedings. But the defendant would not be prejudiced thereby because he would have been contesting the suit all the time in the state court just as if there had never been any attempt at removal. The most objectionable feature of this strategy is the great additional expense required to litigate the same suit in two different courts at the same time.

It has been said that the defendant suffers through his own fault where he loses his case or incurs expense by being torn between the conflicting court systems; that if he seeks to remove a case not properly within the federal jurisdiction he should bear the consequences of his act.[40] But it should be remembered that the law of removals is ex-

district court only during the time the case might remain in the federal court, and had special reference to the removal and rested solely on the petition for removal." Morbeck v. Bradford-Kennedy Co., 19 Idaho 83, 91, 113 Pac. 89, 90 (1910); McCanna v. Mutual Investment & Agency Co., 37 N. M. 597, 26 P. (2d) 231 (1933); Citizens' Light, Power & Telephone Co., v. Usnik, 26 N. M. 494, 194 Pac. 862 (1920); Tracy Loan & Trust Co. v. Mutual Life Ins. Co., 79 Utah 33, 7 P. (2d) 279 (1932).

[38] Metropolitan Casualty Ins. Co. v. Stevens, 312 U. S. 563, 61 S. Ct. 715, 85 L. ed. 1044 (1941); Carson v. Hyatt, 118 U. S. 279, 6 S. Ct. 1050, 30 L. ed. 167 (1886); Baltimore & O. R. R. Co. v. Koontz, 104 U. S. 5, 26 L ed. 643 (1881); Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354 (1880); Removal Cases, 100 U. S. 457, 25 L. ed. 593 (1879); *see* Pruitt v. Charlotte Power Co., 165 N. C. 416, 420, 81 S. E. 624, 626 (1914); Springs v. Southern R. R. Co., 130 N. C. 186, 198, 41 S. E. 100, 104 (1902); Howard v. Southern R. R. Co., 122 N. C. 944, 953, 29 S. E. 778, 781 (1898).

[39] See notes 9, 11, 21, & 38 *supra*.

[40] "It seems to us proper and entirely just to both litigants to hold that when a defendant petitions for the removal of a cause from a state to a federal court, he becomes the actor in that particular, and that he must assume the risk and consequences that follow, if he is unsuccessful, and in the meantime has failed to protect and preserve his right under the state statute and rules of practice prevailing in the state court. . . . The statute fixes the time within which a defendant shall appear and answer. That applies alike to all defendants. These appellants have had the same time as is allowed every other defendant in the state courts. The fact that appellants exhausted a part of their time in a vain endeavor to get out of the state court into the federal court is neither the fault of the law, the courts, nor the adverse party. If they saw fit to exhaust a part of their 'day in court' in an effort to get into another forum and failed, the consequence should justly and properly fall upon them, and upon no one else. It should not serve as a means of extending the time allowed them by statute or of delaying the adverse

tremely complex and technical. The cases seem to be in chaotic conflict on many points.[41] To add to the confusion a Circuit Court of Appeals has recently upheld a District Court's revocation of a remand order it had entered at the same term four days previously.[42] It is an open question whether any state proceedings which could have been taken during the intervening four-day period would have been valid or *coram non judice*.[43] Where such uncertainty exists, and the defendant can hardly foresee how he may be bandied about between the court systems, it seems harsh to beset him with so many dangers when he seeks to secure his right to a federal trial.

The hardship is especially apparent where the state court has granted the removal and thus led the defendant to believe he was safely within the federal jurisdiction. In not filing his answer the defendant has relied on the action of the state court, and it seems unjust indeed for that court to enter a default judgment in such cases.[44] An avoidance of such a vicious policy would certainly lead to more equitable results.

Much trouble would be circumvented by rendering the injunction safeguard more effective. The injunction should operate to toll any lapse of time in the state court as well as to stay affirmative proceedings there.[45] At present the federal court will not enjoin proceedings in the state court after removal in cases where the jurisdictional question is in doubt,[46]—but it is in those very cases that the injunction is most needed. In the doubtful cases there is more likelihood that the state court will insist that it has jurisdiction and proceed to judgment, and also greater probability that the federal court will subsequently remand the cause.[47] Many hard cases would be avoided by a statutory provision

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party in getting his case to trial after the question of jurisdiction has been determined." Morbeck v. Bradford-Kennedy Co., 19 Idaho 83, 93, 94, 113 Pac. 89, 91, 92 (1910). This passage has been often quoted.

[41] Compare Boston, *Removal of Suits from State to United States Courts—A Picture of Chaos Demanding a Remedy* (1919) 88 CENT. L. J. 246, with Urquhart, *Is the Law in Reference to the Removal of a Civil Case from a State Court to the United States Court in a Chaotic Condition?* (1919) 89 CENT. L. J. 280; Dobie, *Frictional Points of Conflict Between State and Federal Courts* (1923) 19 VA. L. REV. 485, 492.

[42] Bucy v. Nevada Const. Co., 125 F. (2d) 213 (C. C. A. 9th, 1942); Note (1935) 2 U. OF CHI. L. REV. 648.

[43] *See* Chisholm v. Propeller Towing Boat Co. of Savannah, 59 S. C. 549, 553, 38 S. E. 156, 157 (1901). "Some steps had been taken in the state court after the filing of the order of remand and before the filing of the order vacating, and it is hardly conceivable that, if judgment had been rendered in the interim, it would be void for want of jurisdiction, since jurisdiction was restored by the order of remand. It being the duty of the state court to accept the order of remand as final, and proceed with the cause, its jurisdiction could in no wise be affected by the vacating order, which was made after the federal court had lost possession and control of the cause."

[44] Germania Fire Ins. Co. v. Francis, 52 Miss. 457, 24 Am. Rep. 674 (1876); see note 37 *supra*.

[45] See notes 36 and 37 *supra*. [46] See note 35 *supra*.

[47] HUGHES, FEDERAL PRACTICE (1931) §§2286, 2655.

that the injunction should issue automatically as a matter of course wherever there is an attempted removal.

The policy of allowing both state and federal courts to pass on the removal question is responsible for much of the conflict. A failure of the two courts to agree may result in the absurdly inefficient spectacle of the same suit, between the same parties, being litigated in two different courts at the same time.[48] If only one court—the federal court—had power to determine the propriety of removal much friction would be eliminated. In such case the state court, knowing that it has no right to determine the jurisdictional question, would probably adopt a much less aggressive policy toward defendants who are seeking removal. Indeed, even under the present arrangement, much distress would never arise if the state courts would assume a more lenient and cooperative attitude toward the problem. The Texas court has taken the lead in even refusing to validate after remand a judgment entered in the interim after filing of the removal petition and before the remand order, even though the defendant answered and defended the case in state court.[49] But since many courts refuse to be so solicitous of the defendant's rights it would be well to require the removal petition to be submitted only to the federal court, as is now done in the case of removal for local prejudice, and deny the state court any voice at all in the removal.

Though many problems could be ironed out by these half-way measures it is felt that many of the difficulties are inherent in the judicial organization itself. Under our unnecessary duplication of judicial machinery, where two courts may both take original cognizance of a suit (and each is fearful of infringing on the other's jurisdiction, and yet withal jealous of its own) many complications are bound to arise.[50] The vast body of federal jurisdictional jurisprudence bears voluminous testimony to this effect. Perhaps all discordant conflict will never be eliminated by anything short of the abolition of any distinction between the state and federal courts and the establishment of a uniform court system.

JOHN T. KILPATRICK, JR.

States—Immunity from Suit in Courts of Sister State

Plaintiff, a Georgia corporation, procured the issuance of a statutory attachment in Georgia against the Florida Hospital for the Insane and the officers of the State, by name. The attachment was levied on several lots of land used in connection with the hospital, the hospital being in

[48] See note 38 *supra*

[49] Texas & P. Ry. Co. v. Davis, 93 Tex. 378, 55 S. W. 562 (1900). Of course in some cases this may work a hardship on the plaintiff.

[50] Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499.

Florida and the land in question in Georgia. Defendants filed a motion to quash and dismiss the levy, contending that by virtue of the fact that the officers of the state were joined in their official capacity, it was in fact a suit against the state and that Florida had not consented to be sued. *Held,* a state cannot claim immunity from suit as to land held in another state.[1]

The Federal Constitution prohibits the maintenance of an action against a state by a private person.[2] This only prevents suits in Federal Courts,[3] but it is well established that a state cannot be sued in its own courts or the courts of a sister state without its express consent.[4] The origin of this rule is not definitely known[5] but the early technical basis of the doctrine of sovereign immunity was that since all writs were issued by the king, he could not be sued by writ because he could not command himself.[6]

Whatever the historical basis for the rule might be, it is an established principle of the American political system, and in absence of a statute expressly giving the power to sue a state, a claim against a state does not present a justiciable question.[7] It is based upon the principle of international comity, used in international law, which causes each sovereign state to decline to exercise its territorial jurisdiction over the person of any sovereign or ambassador or over the public property of any state which is destined for public use.[8]

Due to the vast number of government agencies, it is the policy of all states[9] as well as the Federal Government[10] to give some of their

[1] Florida State Hospital for Insane v. Durham Iron Co., 17 S. E. (2d) 842 (Ga. App. 1941).

[2] U. S. CONST. AMEND. XI.

[3] Florida State Hospital for Insane v. Durham Iron Co., 192 Ga. 459, 15 S. E. (2d) 509 (1941).

[4] Hans v. Louisiana, 134 U. S. 1, 10 S. Ct. 504, 33 L. ed. 842 (1890); Beers v. Arkansas, 20 How. 527, 15 L. ed. 991 (1858).

[5] See Kawananakoa v. Polyblank, 205 U. S. 349, 27 S. Ct. 526, 51 L. ed. 834 (1907).

[6] See McClellan v. State, 35 Cal. App. 605, 170 Pac. 662 (1917) (see argument made by counsel for plaintiff, 170 Pac. at 663); Note (1922) 35 HARV. L. REV. 335.

[7] Utah Const. Co. v. State Highway Commission, 45 Wyo, 403, 19 P. (2d) 951 (1933).

[8] Monaco v. Mississippi, 292 U. S. 313, 54 S. Ct. 745, 78 L. ed. 1282 (1933); Mason v. Intercolonial Ry. of Canada, 197 Mass. 349, 83 N. E. 876 (1908); Nathan v. Virginia, 1 Dall. 77 n. (Pa. 1781) (see note 1 L. ed. 44); The Ice King, German Reichsgericht (1921) 103 Entscheidungen des Reichsgerichts in Zivilsachen 274 (HUDSON, CASES ON INTERNATIONAL LAW (1929) 536).

[9] North Carolina Governmental Employees Retirement System, N. C. CODE ANN. (Michie, 1939) §3212(8); North Carolina State Thrift Society, N. C. CODE ANN. (Michie, 1939) §1126; State Highway Commission, N. C. CODE ANN. (Michie, 1939) §3846(J); Commissioner of Banks, N. C. CODE ANN. (Michie, 1939) §221(q).

[10] Reconstruction Finance Corporation Act, 47 STAT. 6 (1932); 48 STAT. 1109 (1934), 15 F. C. A. 604 (1937); Tennessee Valley Authority Act, 48 STAT. 59 (1933), 5 F. C. A. 831(C) (1937); Federal Deposit Insurance Corporation, 4 F. C. A. 264(J) (1937).

agencies the right to sue and be sued in their own names. But a judgment obtained against such an agency must be satisfied out of the assets of the agency; the state is not bound if those assets are not sufficient to meet the debt.[11]

The preceding statements apply to incorporated and unincorporated agencies. There is, however, some authority to the effect that this right is acquired only through the permission of the state, and that when one state directly and without the intervention of a separate corporation operates what is generally regarded as a private business, in another state, it does not surrender its sovereignty.[12]

To constitute a suit against a state it is not necessary that the state be sued directly, but any action in which the property of the state will be affected is a suit against the state.[13] This is especially true if the land held by the state or its agency is held for a public purpose,[14] as was the land in the instant case.

The court in reaching its decision relied mainly on *Georgia v. City of Chattanooga*,[15] which is a comparatively recent United States Supreme Court decision holding that the property of a railroad operated by Georgia in Tennessee was subject to eminent domain. This case is distinguishable from the instant case on two grounds. First, eminent domain is a burden to which all property is subject regardless of the character of its ownership.[16] Therefore the subjection of state property to eminent domain would not be tantamount to an attachment against that property by an individual for a contract debt. Second, the court in *Georgia v. City of Chattanooga* concluded that operating a railroad was a non-governmental function, whereas state hospitals for the insane are generally held to be created to perform governmental functions.[17] Even the most liberal advocates for a relaxation of the sovereign immunity rule concede that the relaxation ought to go only to the extent of permitting suit when the state engages in a non-governmental function.[18] Therefore, the grounds for allowing suit against a state agency engaged in a non-governmental function would not logically apply when the agency being sued is engaged in a governmental function, as is the hospital in the instant case.

[11] State v. Loche, 29 N. M. 148, 219 Pac. 790 (1923).

[12] Paulus v. South Dakota, 58 N. D. 643, 227 N. W. 52 (1929) (South Dakota operated a coal mine in North Dakota); Note (1925) 38 HARV. L. REV. 989.

[13] Danforth v. United States, 102 F. (2d) 5 (C. C. A. 8th, 1939).

[14] El Camino Irr. Dist. v. El Camino Land Corp., 12 Cal. (2d) 378, 85 P. (2d) 123 (1938).

[15] 264 U. S. 472, 44 S. Ct. 369, 68 L. ed. 796 (1924).

[16] See Paulus v. South Dakota, 58 N. D. 643, 227 N. W. 52 (1929).

[17] University of Louisville v. Metcalfe, 216 Ky. 339, 287 S. W. 945 (1926); McKay v. Washoe General Hospital, 55 Nev. 336, 33 P. (2d) 755 (1934); Maia's Adm'r v. Eastern State Hospital, 97 Va. 509, 34 S. E. 617 (1899).

[18] See Hayes, *Private Claims Against Foreign Sovereigns*, (1925) 38 HARV. L. REV. 599.

In denying the defendant's petition for rehearing, the court made a point of the fact that the issue of sovereignty was raised by the State of Florida and not by the plaintiff. It is difficult to perceive how that fact could have any bearing on the point at issue, because if the suit is in fact a suit against a state it is immaterial who raised the issue, the burden always being upon the one suing a state to show affirmatively that the state has consented to be sued.[19]

On the basis of the conclusions reached it might appear that the plaintiff, if not allowed to prosecute the suit, would have been left without a remedy. This does not necessarily follow, because, as suggested by counsel for the defendant, the plaintiff could have appealed to the legislature of Florida.[20] The argument might be made that such remedy is of doubtful value; however, it must be kept in mind that one who deals with an agency of a state is charged with knowledge of its immunity from suit, and to this extent deals at his own risk.[21]

It is submitted that the case was not properly decided in that it permitted suit against a state agency created to perform a governmental function. The decision is not in harmony with the majority view as the law stands today. However, it might well represent a trend on the part of the judiciary toward making more flexible the rule which allows states immunity from suit.

JOHN W. LANGFORD.

Tenancy by the Entirety—Effect of Willful Default in Payment of Loan Secured by Deeds of Trust and Attempted Purchase by One Tenant at Foreclosure Sale—Constructive Trusts

H. and *W.*, during coverture, purchased certain real property and received title thereto as tenants by the entirety. Thereafter, while the marital relation continued to exist, they executed deeds in trust thereon to secure money borrowed. Default in payment having occurred, the property was sold under power of sale contained in the deeds of trust. A third party became purchaser, and later reconveyed to *H.* *H.* and *W.* were divorced shortly thereafter, and *W.* brought this action against *H.*, alleging (1) that *H.* received all the income from the property and purposely defaulted in payment of the loan in order to oust *W.* from her interest[1] in the entirety estate by purchasing at the trustee's sale,

[19] Grande v. Casson, 50 Ariz. 397, 72 P. (2d) 676 (1937).
[20] See Florida State Hospital for Insane v. Durham Iron Co., 17 S. E. (2d) 842, 848 (Ga. App. 1941).
[21] See Dunn Const. Co. v. State Board of Adjustment, 243 Ala. 372, 175 So. 383 (1937).

[1] *W.* further offered to prove that she contributed more than half of the original purchase price. In its decision, the court held that, having been a tenant by the entirety and having conveyed her interest in trust by joining in the deeds

and (2) that *H.*, through the third party, was the actual purchaser at the sale. The North Carolina Supreme Court *held* that if *W.* could prove these allegations, *H.* would be regarded as holding the title in trust for her, and that she must elect within a reasonable time to avail herself of such trust.[2]

This being the first case of this nature concerning a tenancy by the entirety to come before the court, the decision was based on the rule applicable to cotenancies under like circumstances. The general rule is that if one cotenant attempts to oust other cotenants of their interests by purchasing an outstanding title, he will be decreed to hold the property in trust for such of the other cotenants as elect within a reasonable length of time to contribute their respective portions of the purchase price.[3] "This principle arises from the privity subsisting between parties having a common possession of the same land, and a common interest in the safety of the possession of each; and it only inculcates that good faith which seems appropriate to their relative possession."[4]

It has been said that the mere relation of cotenancy is not considered in North Carolina to be of such a confidential nature as to forbid the purchase by one cotenant of the common property at a public sale, either under legal process or under a power in a trust deed.[5] Two cases are cited in support of this contention.[6] An examination of these cases reveals, however, that the purchasing cotenants were allowed to acquire the title free of any trust in favor of the other cotenants because of the fact that the encumbrances under which the sales were made were placed on the land by the common ancestors through which all the cotenants claimed, rather than by any or all of the cotenants themselves.[7] In neither case is it indicated that the exception to the general rule is based on the fact that the sale was a public one under legal process.[8] Thus, the North Carolina view, expressed through two hold-

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of trust, it was immaterial as to what part, if any, of the purchase price she had paid. Hatcher v. Allen, 220 N. C. 407, 409, 17 S. E. (2d) 454, 455 (1941).

[2] Hatcher v. Allen, 220 N. C. 407, 17 S. E. (2d) 454 (1941).

[3] Salter v. Odom, 240 Ala. 462, 199 So. 687 (1940); Stewart v. Sherman, 22 Calif. App. (2d) 198, 70 P. (2d) 702 (1937); Kievman v. Grevers, 122 Conn. 406, 189 Atl. 609 (1937); Hayden v. Hughes, 147 Kan. 511, 77 P. (2d) 64 (1940); Binning v. Miller, 55 Wyo. 478, 102 P. (2d) 64 (1940); TIFFANY, REAL PROPERTY (3d. ed. 1939) §463; FREEMAN, COTENANCY AND PARTITION (1882) §154.

[4] Marshall, J., in Venable v. Beauchamp, 33 Ky. 321, 324 (1836).

[5] Note (1919) 6 A. L. R. 297.

[6] Troxler v. Gant, 173 N. C. 422, 92 S. E. 152 (1917); Jackson v. Baird, 148 N. C. 29, 61 S. E. 632 (1908).

[7] The practice of making an exception to the rule when the sale is under an encumbrance placed on the land by the common predecessor in title is criticized in Note (1908) 19 L. R. A. (N. S.) 591.

[8] A District of Columbia case, Starkweather v. Jenner, 216 U. S. 524, 30 S. Ct. 382, 54 L. ed. 602 (1910), does expressly except purchase at a public sale from the operation of the rule, all fraud aside.

ings[9] and several dicta,[10] is in accord with the general rule denying a tenant in common the right of purchasing any outstanding interest to the detriment of his cotenants, provided the latter elect within a reasonable length of time to take advantage of the trust by paying him a proportionate share of his expenditures.

It is fitting that the court, for purposes of deciding the principal case, should draw an analogy between the natures of tenancies by the entirety and tenancies in common. Tenants by the entirety are even more likely to occupy positions of mutual trust and confidence than are tenants in common. They derive their title through the same instrument, and, being husband and wife, they take the entirety estate as one person.[11] It is well that neither should be allowed to acquire an outstanding title to the detriment of the other.

Another possible reason for the application of rules governing tenancies in common to the instant case, not mentioned by the court, is the fact that, at the time of the trial, the parties actually *were* tenants in common, the divorce which occurred between the time of the sale and the time of the trial having converted them into such.[12]

Only one case[13] has been found wherein a tenant by the entirety purchased the interest of the other tenant at a public sale. In that case, a New Jersey court upheld the right of a wife to purchase, as trustee for her children, the interest of her husband in entirety property; and the court further said, by way of dictum, that she would have had the same right as anyone else to acquire the title free of any trust, even though she purchased, not as trustee, but for her exclusive benefit. This seems directly opposed to the result reached in the principal case. The court may have been influenced by the fact that only the interest of the husband was being sold, it being permissible for the interest of one tenant by the entirety to be sold under execution in New Jersey.[14] This latter principle tends to destroy the idea of unity and confidential relation. The sale of the interest of one spouse would not be allowed in North Carolina.[15]

Thus, a commendable result has been achieved in the principal case. When property is held by the entireties, the husband is entitled to the

[9] Sutton v. Sutton, 211 N. C. 472, 190 S. E. 718 (1937); Gentry v. Gentry, 187 N. C. 29, 121 S. E. 188 (1924).

[10] See McLawhorn v. Harris, 156 N. C. 107, 111, 72 S. E. 211, 213 (1911); Jackson v. Baird, 148 N. C. 29, 30, 61 S. E. 632 (1908), cited *supra* note 6; Bailey v. Howell, 209 N. C. 712, 715, 184 S. E. 476, 478 (1936); Smith v. Smith, 150 N. C. 81, 82, 63 S. E. 177 (1908).

[11] TIFFANY, REAL PROPERTY (3rd. ed. 1939) §430; FREEMAN, COTENANCY AND PARTITION (1882) §70.

[12] McKinnon, Currie & Co. v. Caulk, 167 N. C. 411, 83 S. E. 559 (1914).

[13] Zubler v. Porter, 98 N. J. L. 444, 120 Atl. 194 (1923).

[14] *Ibid.*

[15] Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222 (1912).

usufruct thereof.[16] It would be manifestly unjust to permit him to fail to use the income from the property to discharge encumbrances thereon, in order that he might later purchase the property for his sole benefit. By means of the remedial device of a constructive trust, the court has prevented such a misfortune.

JOEL DENTON.

[16] Lewis v. Pate, 212 N. C. 253, 193 S. E. 20 (1937).